

ESTTA Tracking number: **ESTTA454507**

Filing date: **02/02/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053426
Party	Defendant Scientific Toys, Ltd.
Correspondence Address	CHESTER ROTHSTEIN AMSTER ROTHSTEIN & EBENSTEIN LLP 90 PARK AVENUE NEW YORK, NY 10016 UNITED STATES ptodocket@arelaw.com, jdoran@arelaw.com
Submission	Reply in Support of Motion
Filer's Name	Neil M. Zipkin
Filer's e-mail	ptodocket@arelaw.com, nzipkin@arelaw.com
Signature	/Neil M. Zipkin/
Date	02/02/2012
Attachments	Supplemental Declaration of Neil M. Zipkin.pdf ( 46 pages )(6952544 bytes ) Scientific's Reply in Support of Its Summary Judgment Cross-Motion.pdf ( 13 pages )(694886 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X  
BACHMANN INDUSTRIES, INC., :  
 :  
Petitioner/Counterclaim Respondent, :  
 :  
v. : Cancellation No.: 92053426  
 :  
SCIENTIFIC TOYS, LTD., :  
 :  
Respondent/Counterclaim Petitioner. :  
-----X

**SUPPLEMENTAL DECLARATION OF NEIL M. ZIPKIN**

Neil M. Zipkin declares:

1. I am a member of the firm of Amster Rothstein & Ebenstein LLP and am submitting this Declaration to identify documentary evidence referred to in Respondent/Counterclaim Petitioner's Scientific Toys' Reply in support its cross-motions for summary judgment.

2. Attached as Exhibit 17 is a true and accurate copy of an Office Action dated May 27, 1998 and a Memorandum of Telephone Communication dated July 6, 1998, signed by Examining Attorney Laura Kovalsky, from the prosecution history of Bachmann's U.S. Trademark Registration No. 2,225,724 for the mark E-Z. These documents also appear as Exhibits C and D, respectively, to the Answer, Affirmative Defenses and Counterclaims.

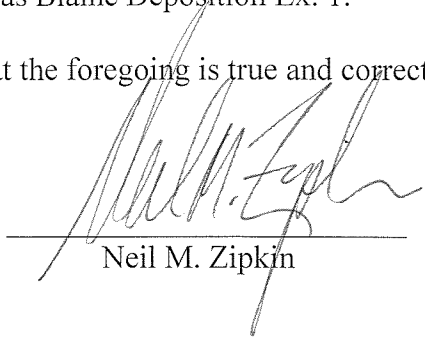
3. Attached as Exhibit 18 is a true and accurate copy of the front cover and pages 3-13 of the Bachmann 1995 catalog produced by Bachmann bearing Bachmann production numbers BI0001, 0003-0013.

4. Attached as Exhibit 19 is a true and accurate copy of the cover and pages 4-19 of the Bachmann 1996 catalog bearing Bachmann production numbers BI0063, 0066-0081.

5. Attached as Exhibit 20 is a true and accurate copy of the Notice to Take Deposition Pursuant to Fed. R. Civ. P. 30(a)1, 30(b)(6) and 37 C.F.R. § 2.120(b) served on Bachmann by Scientific Toys which was identified as Blaine Deposition Ex. 1.

6. I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 2, 2012  
New York, New York



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Neil M. Zipkin

# **EXHIBIT 17**

D

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office

<b>SERIAL NO.</b> 75/412444 Bachmann Industries, Inc. <b>MARK</b>		<b>PAPER NO.</b>
<b>ADDRESS</b> MICHAEL L LOVITZ PANITCH SCHWARZE JACOBS & NADEL PC 1 COMMERCE SQ 1 COMMERCE SQ2005 MARKET ST 22ND FL PHILADELPHIA PA 19103-7086		<b>ADDRESS:</b> Assistant Commissioner for Trademarks 2900 Crystal Drive Arlington, VA 22202-3513  <small>If no fees are enclosed, the address should include the words "Box Responses - No Fee."</small>
<b>ACTION NO.</b> 01 <b>MAILING DATE</b> 05/27/98 <b>REF. NO.</b>		<b>Please provide in all correspondence:</b>  1. Filing Date, serial number, mark and Applicant's name. 2. Mailing date of this Office action. 3. Examining Attorney's name and Law Office number. 4. Your telephone number and ZIP code.
<b>FORM PTO-1525 (5-90)</b> <b>U.S. DEPT. OF COMM. PAT. &amp; TM OFFICE</b>		7011-42

**A PROPER RESPONSE TO THIS OFFICE ACTION MUST BE RECEIVED WITHIN 6 MONTHS FROM THE DATE OF THIS ACTION IN ORDER TO AVOID ABANDONMENT.**  
*For your convenience and to ensure proper handling of your response, a label has been enclosed. Please attach it to the upper right corner of your response. If the label is not enclosed, print or type the Trademark Law Office No., Serial No., and Mark in the upper right corner of your response.*

RE: Serial Number: 75/412444

The assigned examining attorney has reviewed the referenced application and determined the following.

**No Conflicting Marks Noted**

The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). TMEP section 1105.01.

**Specimens Unacceptable**

The specimens are unacceptable as evidence of actual trademark use because they do not show use of the mark as it appears on the drawing page. The drawing displays the mark as E-Z. However, this differs from the display of the mark on the specimens, where it appears as E-ZMATE. The applicant cannot amend the drawing to conform to the display on the specimens because the character of the mark would be materially altered. 37 C.F.R. Section 2.72(a); TMEP section 807.14(a).

Therefore, the applicant must submit three substitute specimens which show use of the mark as it appears on the drawing. 37 C.F.R. Section 2.51; TMEP section 807.14. The applicant must verify, with an affidavit or a declaration under 37 C.F.R. Section 2.20, that the substitute specimens were

in use in commerce at least as early as the filing date of the application. 37 C.F.R. Sections 2.59(a) and 2.72(b); TMEP section 905.10

The following is a properly worded declaration under 37 C.F.R. Section 2.20. At the end of the response, the applicant should insert the declaration signed by Richard N. Maddox.

*The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that the facts set forth in this application are true; all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.*

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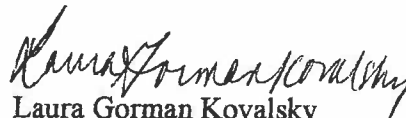
(Signature)

---

(Print or Type Name and Position)

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(Date)



Laura Gorman Kovalsky

Trademark Attorney

Law Office 106

(703) 308-9106, x147 *rv*



## MEMORANDUM OF TELEPHONE COMMUNICATION - For File

Date: 7/6/98 Mark/Serial No. E-Z 75412444Call To ☒ Michael Kovitz  
From ☒Area Code: (215) Telephone No. 965-1247Examining Attorney: Laura KoraliskyReason for Call: OA issued re: Sub. specs needed -- App1's  
attorney noted the correct mark is imprinted on the goods  
themselves, though not necess. on packagingComments: NO RESPONSE REQUIREDAKK.

# **EXHIBIT 18**



# BACHMANN 1995

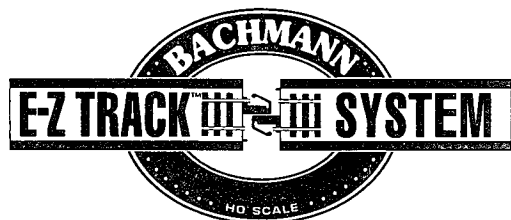


BI 0001

**BACHMANN's E-Z Track™ System...**  
*Now that's the way  
to run a railroad!*



**BACHMANN's E-Z Track™ System...Now that's the way to run a railroad!**

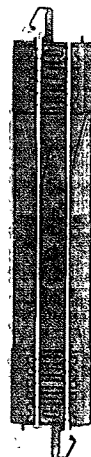
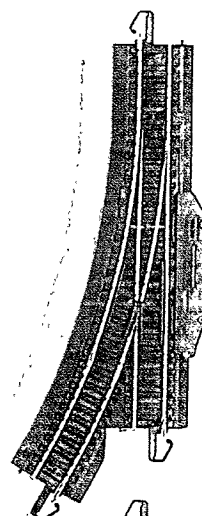
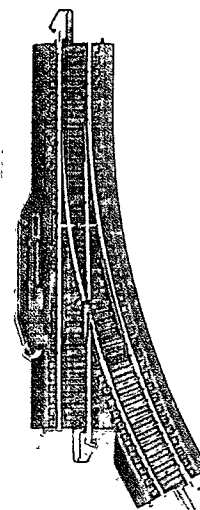
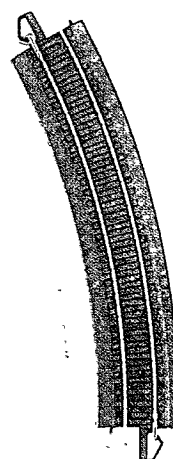
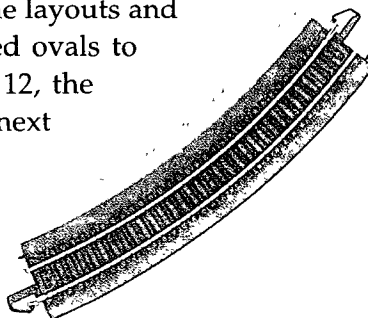


## The "E-Z" Way to Build a Railroad

Who ever thought building a railroad could be so "E-Z"? A few quick snaps to assemble our exclusive *E-Z Track™* track and roadbed system, and you'll have an operating train in less than 15 minutes. Put it on the floor or carpet, place it under the Christmas tree, or make it part of your permanent layout. It's quick, fun and "E-Z."

With the *E-Z Track™* system, gone are the layout boards, nails, screws and tools once required for train setup. *E-Z Track's™* snapfit assembly and plug-in wiring provides immediate railroad enjoyment, and its tight track connections give firm support for smooth, trouble-free operation. *E-Z Track's™* secret is its hidden locking feature that holds track sections securely together until *you're* ready to take them apart. *E-Z Track™* also makes layouts easy to move, change and expand for design flexibility: you just snap and go.

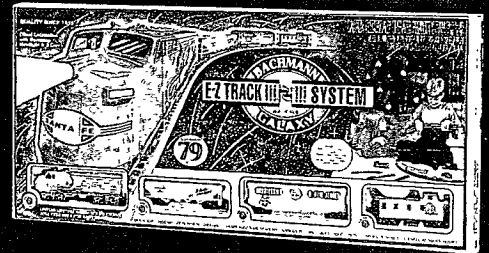
In 1995, we're adding to our *E-Z Track™* line with remote left and right switches, bumpers, a 30° crossing, 22" radius curved track, an 18" curved terminal rerailer, and for layout convenience, a 3" section of straight track. We're also offering a new book authored by Robert Schleicher detailing three layouts and twenty track plans created with *E-Z Track™*. The layouts and plans range from simple, modified ovals to the truly grand. Shown on page 12, the book is a great way to start your next railroad project the "E-Z" way.



## The Galaxy, an E-Z Track™ set

Item No. 00610      Standard Pack: 6

Reflecting the wonders of the heavens in its full *Lustra Chrome* finish, the Galaxy's engine glints brightly in the moonlight as it presses on with its load. The Galaxy comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:



NEW  
1995

SET CONTAINS  
79 PIECES!  
Includes 24 Signs,  
12 Telephone Poles  
& 24 Figures

- an F9 diesel locomotive with full *Lustra Chrome* finish and operating headlight
- open quad hopper
- plug door box car
- steel off-center caboose
- 47" x 38" oval E-Z Track™ set with 12 pieces of curved track, 1 piece of straight track and 1 plug-in terminal rerailer track
- 24 figures
- 12 telephone poles
- 24 railroad and street signs
- UL listed power pack
- and illustrated "Bach Man" instruction manual

**BACHMANN's E-Z Track™ System...Now that's the way to run a railroad!**

## The Meteor, an E-Z Track™ Set

Item No. 00611     Standard Pack 6

As if in salute, a sudden streak of light crosses the sky as the Meteor races through the night. The favor is returned with a flash from the locomotive's headlight! This set comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus



**NEW  
1995**

**SET CONTAINS  
104 PIECES!**

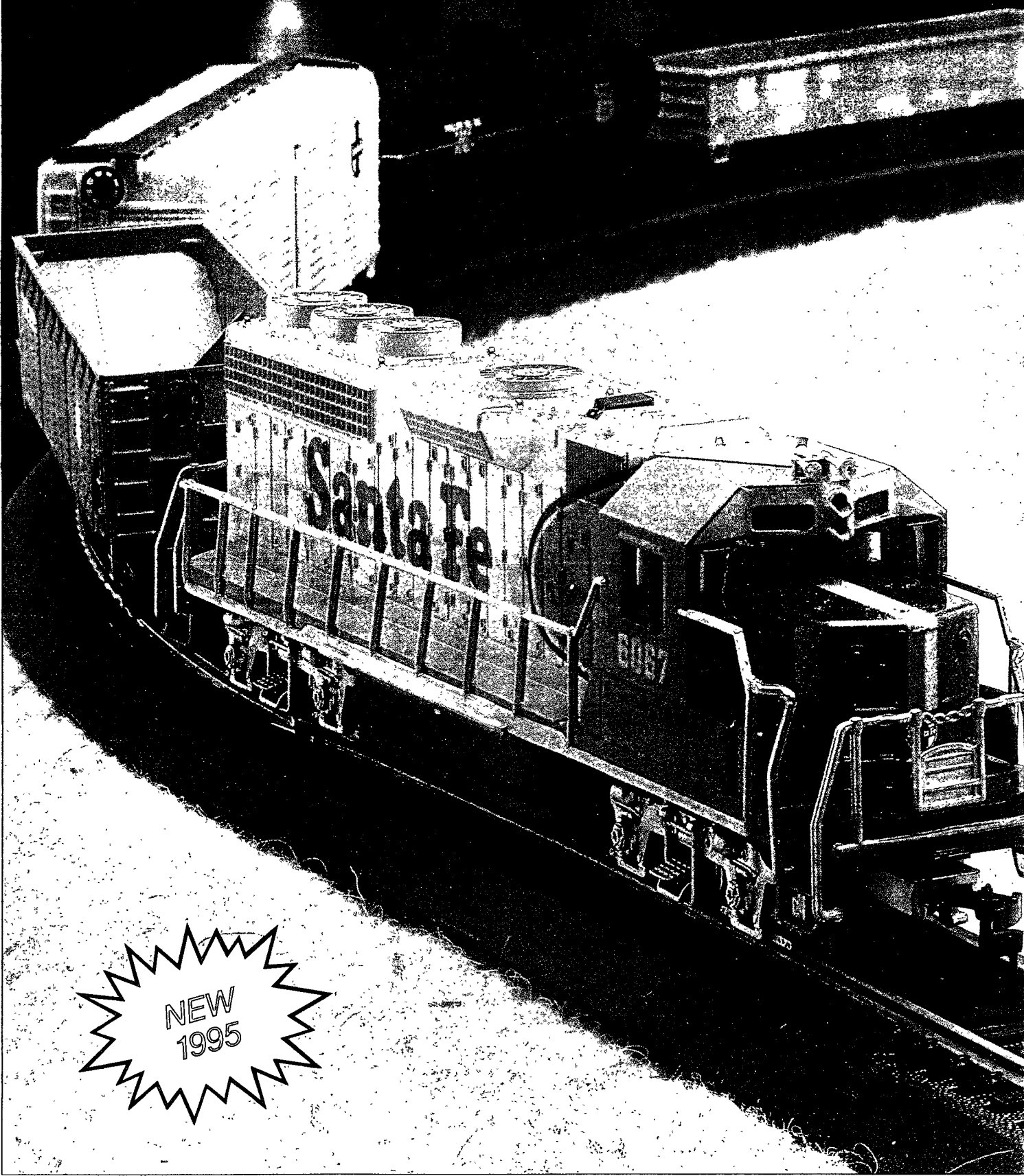
**Includes 24 Signs,  
24 Telephone Poles  
& 36 Figures**

- an F9 diesel locomotive with full *Lustral Chrome* finish and operating headlight
- gondola
- open quad hopper
- plug door box car
- steel off-center caboose
- 47" x 38" oval E-Z Track™ set with 12 pieces of curved track, 1 piece of straight track and 1 plug-in terminal rerailer track
- 36 figures
- 24 telephone poles
- 24 railroad and street signs
- UL listed power pack
- and illustrated "Bach Man" instruction manual



# The Thunderbolt, an E-Z Track™ set

Item No. 00612     Standard Pack 6



# BACHMANN's E-Z Track™ System...*Now that's the way to run a railroad!*

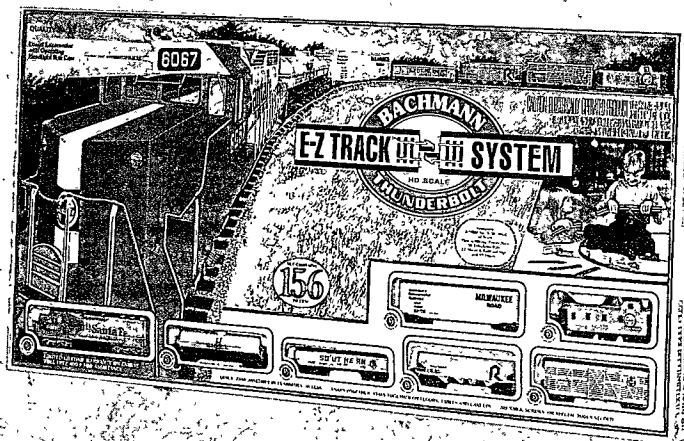
Hold on tight! The distant roar and trembling earth can only mean one thing, the Thunderbolt is on its way. This set comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:

- a GP40 diesel locomotive with operating headlight
- open quad hopper
- plug door box car
- gondola
- single dome tank car
- wood stock car
- steel off-center caboose
- 56" x 38" oval E-Z Track™ set with 12 pieces of curved track, 3 pieces of straight track and 1 plug-in terminal rerailer track,
- 48 figures
- 36 telephone poles
- 48 railroad and street signs
- UL listed power pack
- and illustrated "Bach Man" instruction manual

SET CONTAINS

156 PIECES!

Includes 48 Signs,  
36 Telephone Poles  
& 48 Figures

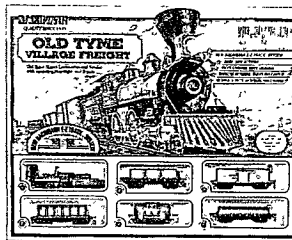


BI 0007

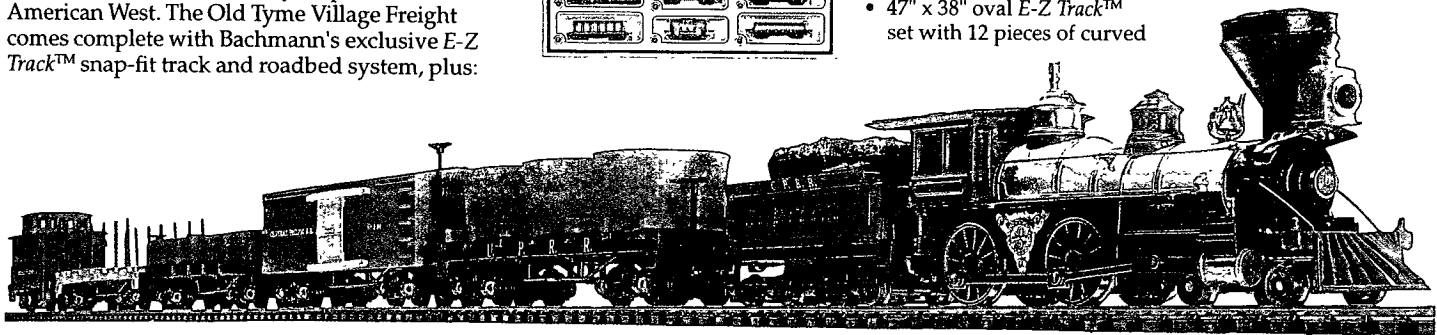
# HO Scale Electric Train Sets

## Old Tyme Village Freight, an E-Z Track™ Set

Item No. 00604 Standard Pack: 6  
Towering mountains, searing deserts and lonely prairies. The Old Tyme Village Freight faced all these and more as it tirelessly helped build the American West. The Old Tyme Village Freight comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:



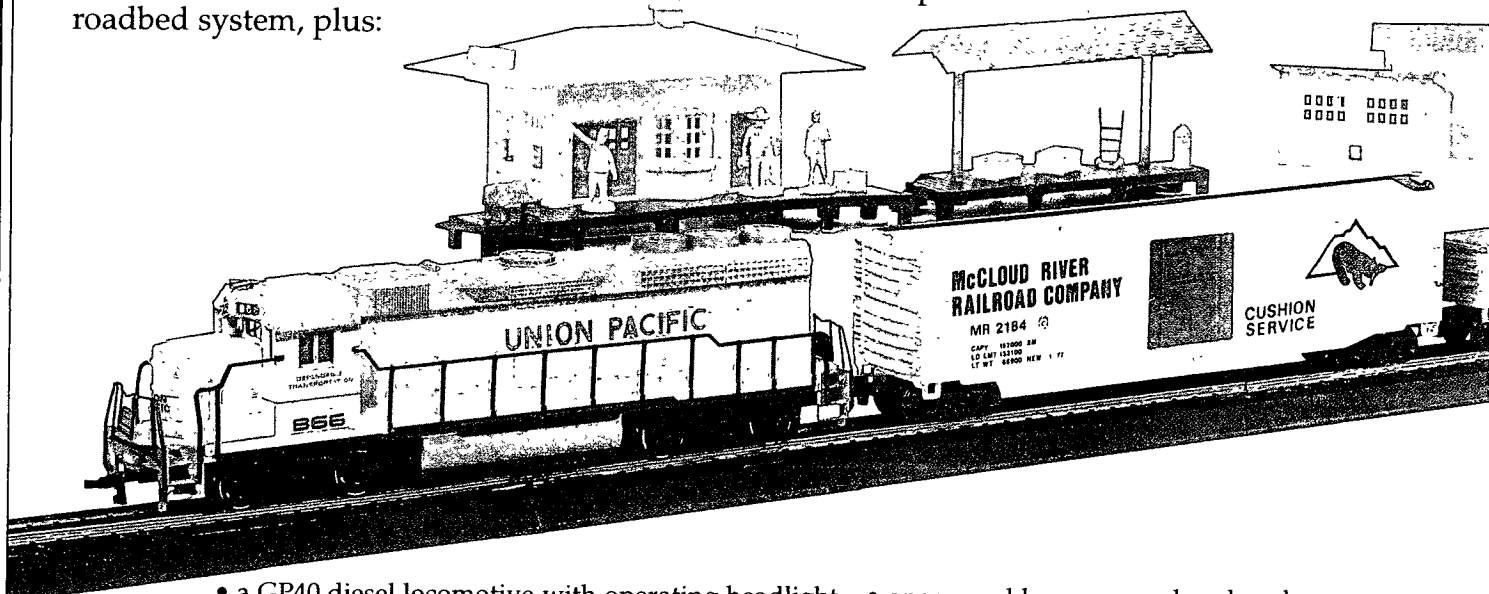
- an American 4-4-0 steam locomotive and tender with operating headlight
- water tank car
- box car
- wood gondola
- flat car
- bobber caboose
- 47" x 38" oval E-Z Track™ set with 12 pieces of curved track, 1 piece of straight track and 1 plug-in terminal railer track
- UL listed power pack
- and illustrated "Bach Man" instruction manual



## The Golden Star, an E-Z Track™ set

Item No. 00608 Standard Pack: 3

This set not only gives you a fantastic train, it also gives you an instant rural community! A train station, farm buildings, barn, silo, school house and signal bridge are ready for quick assembly into a picturesue layout. The Golden Star comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:



- a GP40 diesel locomotive with operating headlight
- open quad hopper
- plug door box car
- gondola
- single dome tank car
- wood stock car
- steel off-center caboose
- 56" x 38" oval E-Z Track™ set with 12 pieces of curved track, 3 pieces of straight track and 1 plug-in terminal railer track
- suburban station
- farm building set
- barn with silo
- school house
- signal bridge
- picket fence set
- park assortment
- 48 figures
- 24 telephone poles
- 48 railroad and street signs
- UL listed power pack
- and illustrated "Bach Man" instruction manual

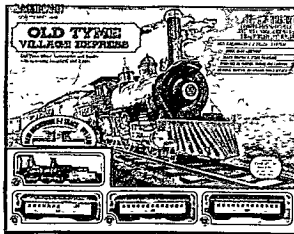
BI 0008

# BACHMANN's E-Z Track™ System...Now that's the way to run a railroad!

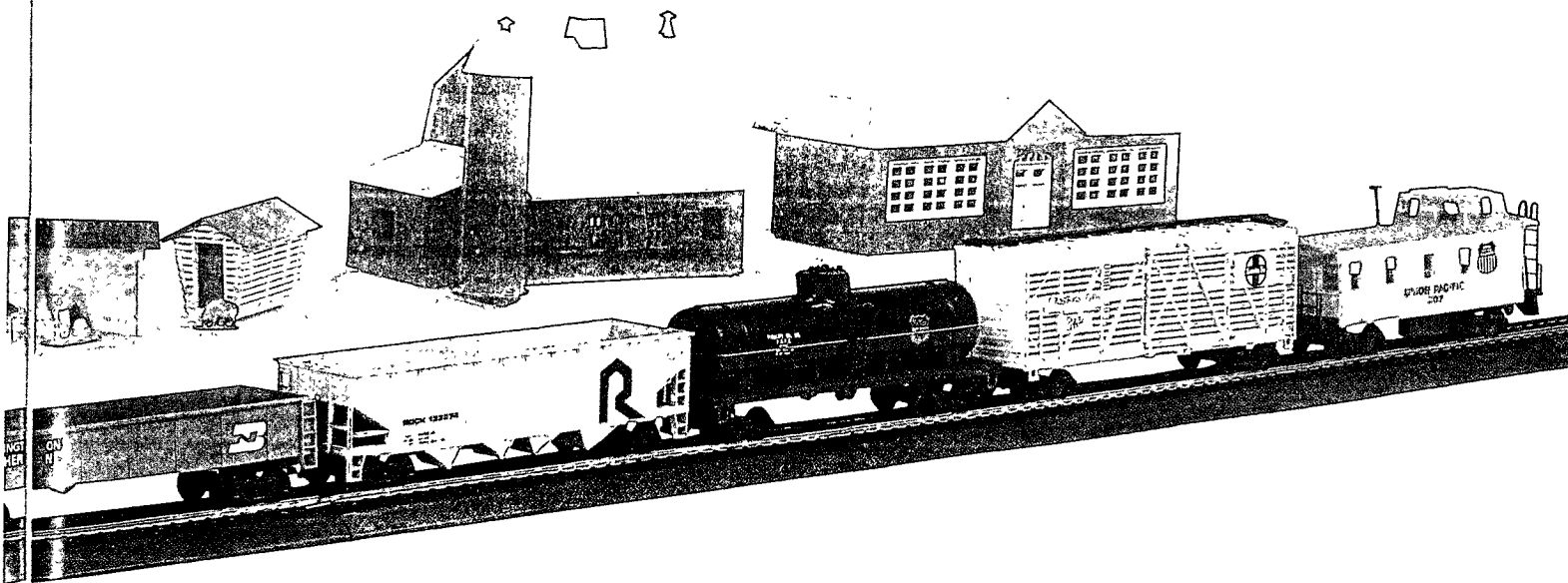
## Old Tyme Village Express, an E-Z Track™ Set

Item No. 00605 Standard Pack: 6

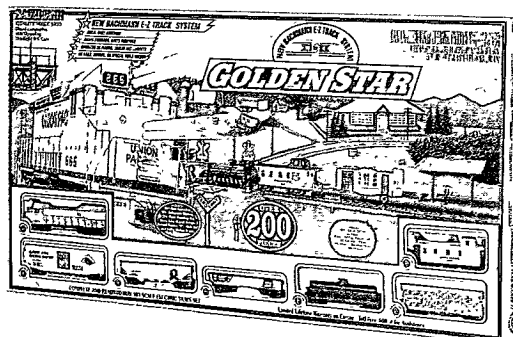
Climb aboard and travel back to the Wild West of the 1800's on the Old Tyme Village Express. The Old Tyme Village Express set comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:



- an American 4-4-0 steam locomotive and tender with operating headlight
- old time combine
- 2 old time coach cars
- 47" x 38" oval E-Z Track™ set with 12 pieces of curved track, 1 piece of straight track and 1 plug-in terminal rerailer track
- UL listed power pack
- and illustrated "Bach Man" instruction manual

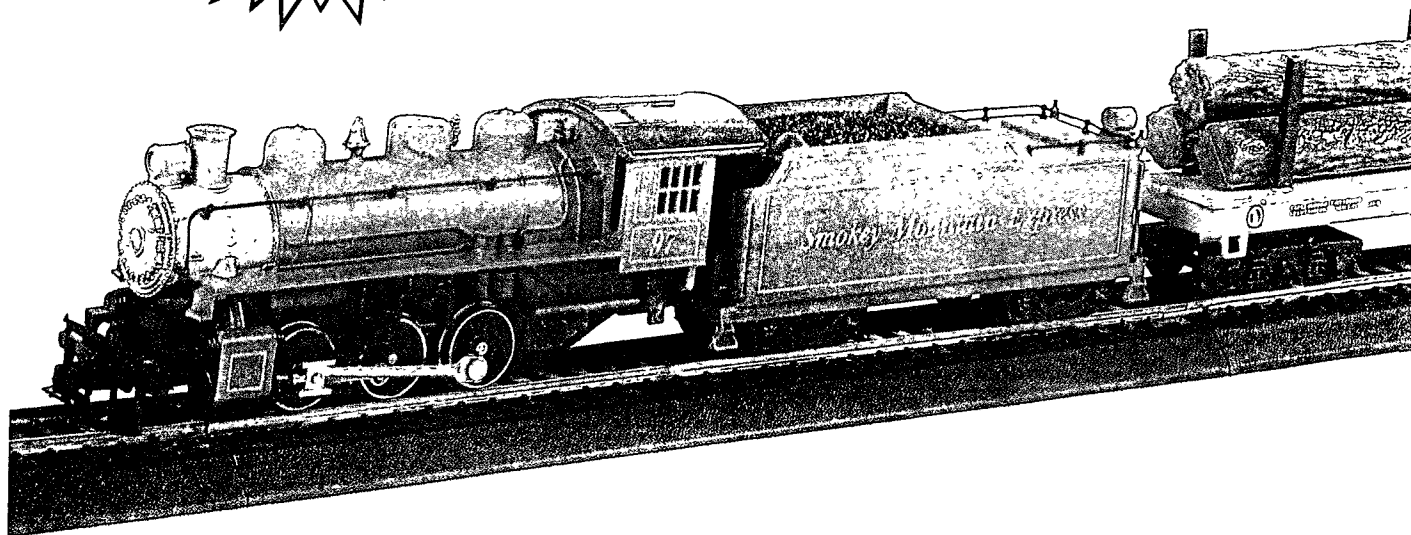


NEW  
1995





# HO Scale Electric Train Sets

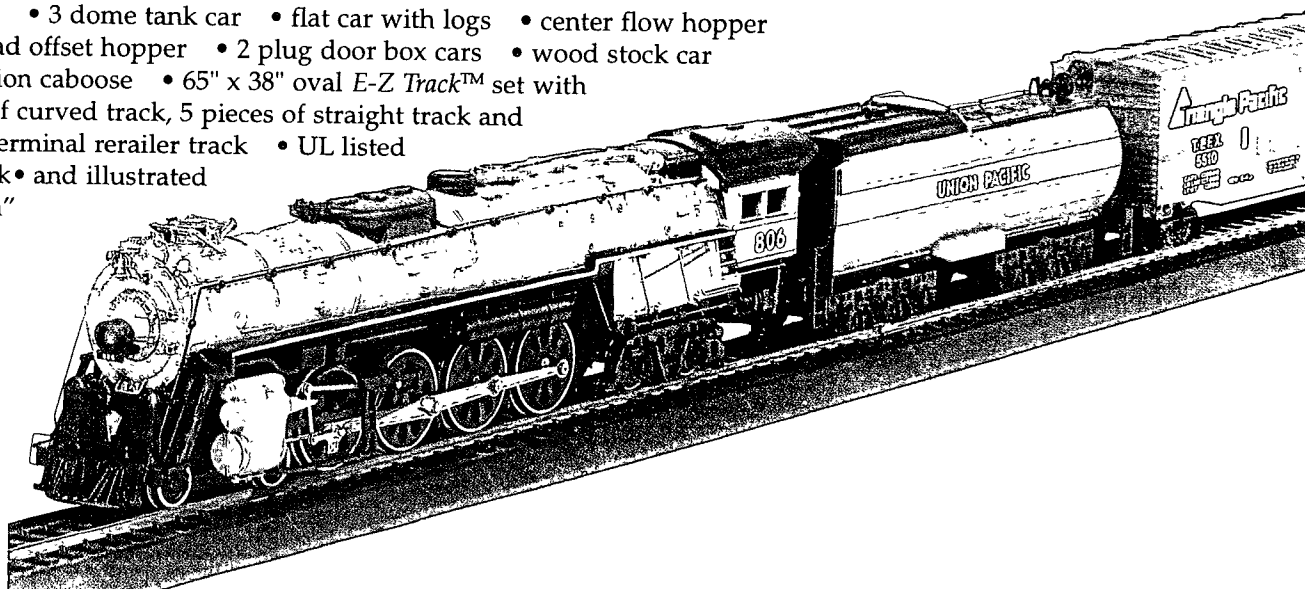


## Overland Limited, an E-Z Track™ set

Item No. 00614     Standard Pack: 6

The biggest and the best for the serious railroad enthusiast. From a powerful 4-8-4 steam locomotive, to an impressive consist of nine cars, this set has it all! The Overland Limited comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:

- a Union Pacific Overland 4-8-4 steam locomotive and tender with operating smoke and headlight features
  - grain car   • 3 dome tank car   • flat car with logs   • center flow hopper
  - open quad offset hopper   • 2 plug door box cars   • wood stock car
  - wide vision caboose   • 65" x 38" oval E-Z Track™ set with
- 12 pieces of curved track, 5 pieces of straight track and  
1 plug-in terminal rerailer track   • UL listed  
power pack • and illustrated  
"Bach Man"  
instruction  
manual

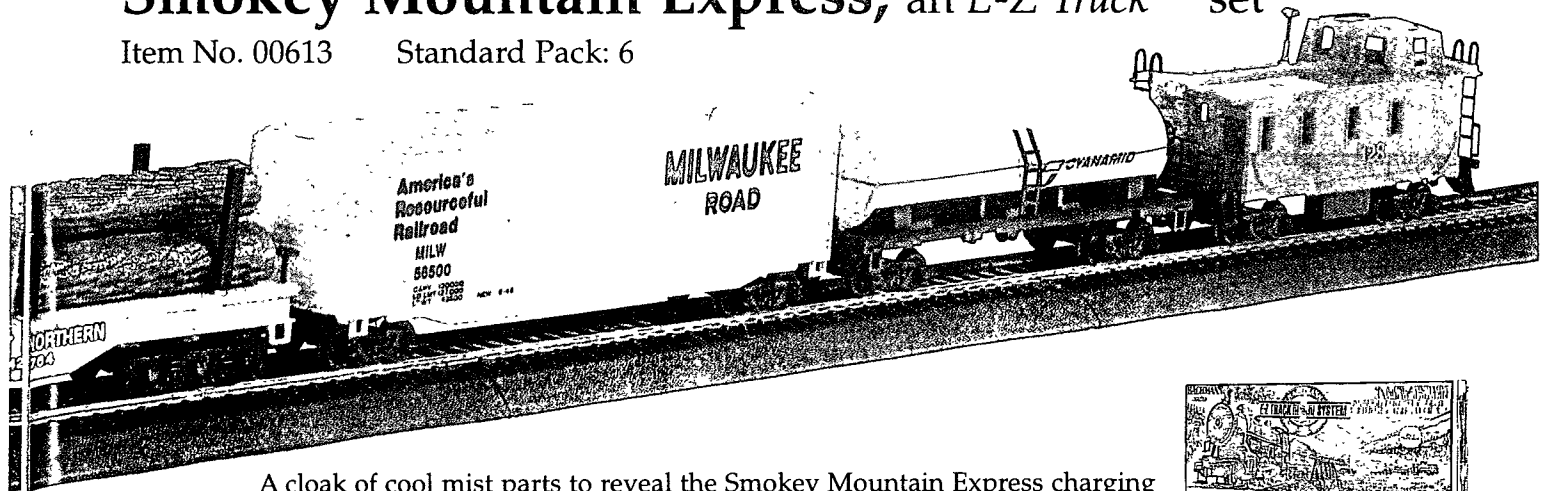


BI 0010

BACHMANN's E-Z Track™ System... *Now that's the way to run a railroad!*

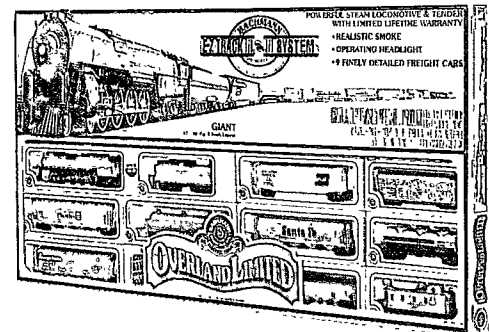
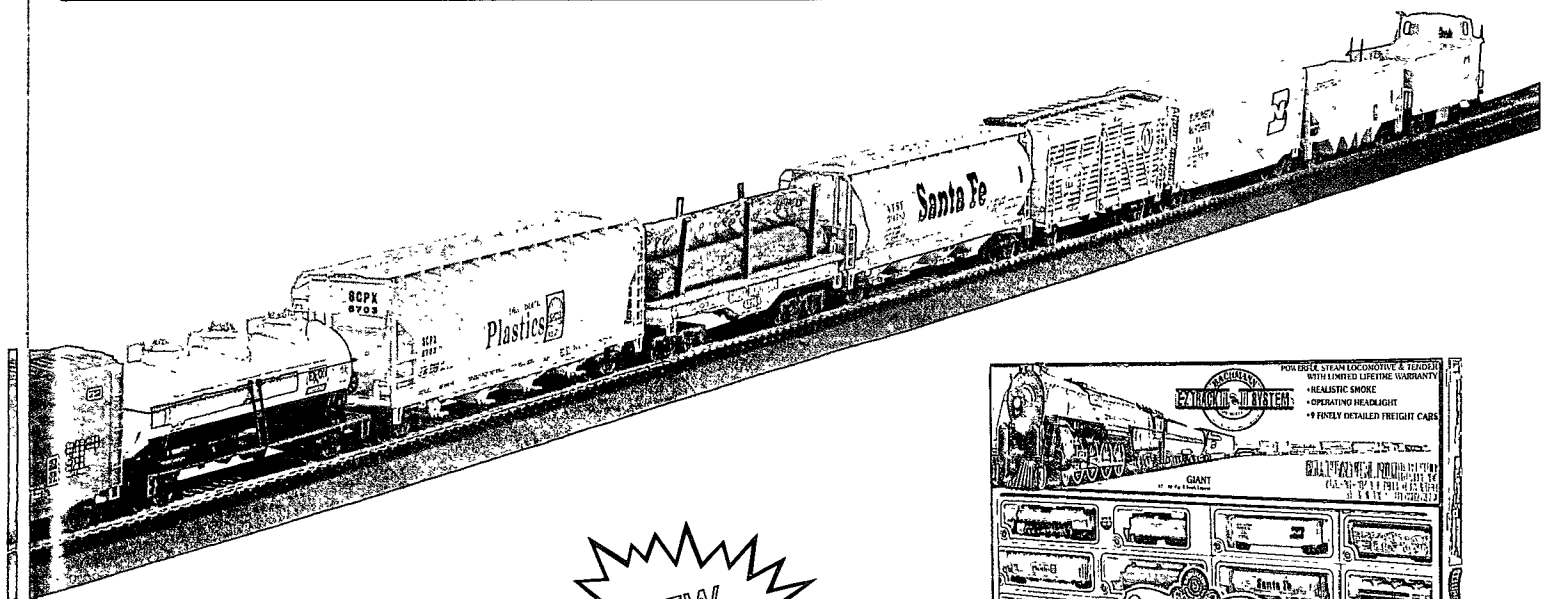
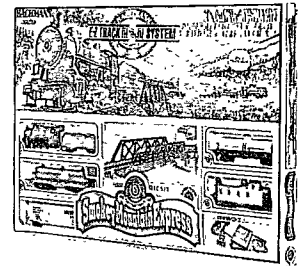
## Smokey Mountain Express, an E-Z Track™ set

Item No. 00613     Standard Pack: 6

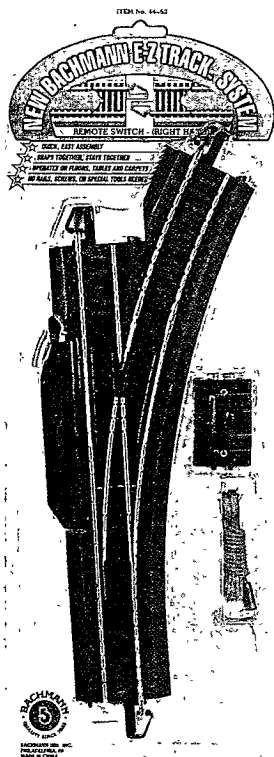


A cloak of cool mist parts to reveal the Smokey Mountain Express charging toward the pass! With their deep forest green colors, the locomotive and tender are in perfect harmony with the mountains. The Smokey Mountain Express comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:

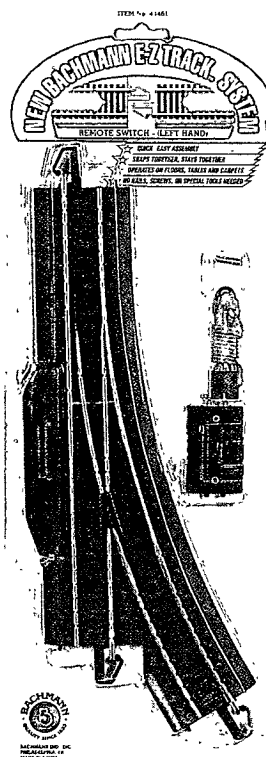
- an 0-6-0 steam locomotive and short haul tender with operating headlight
- plug door box car • flat car with logs • 3 dome tank car • steel off-center caboose
- 47" x 38" oval E-Z Track™ set with 12 pieces of curved track, 1 piece of straight track and 1 plug-in terminal rerailer track
- 24 figures
- 24 telephone poles • 24 railroad and street signs • UL listed power pack
- and illustrated "Bach Man" instruction manual



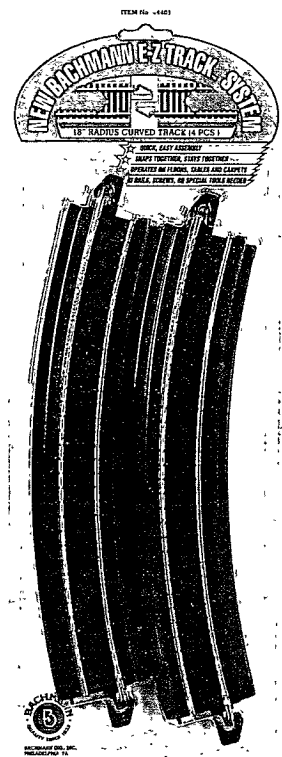
# E-Z Track™ and Accessories



Remote Switch - Right



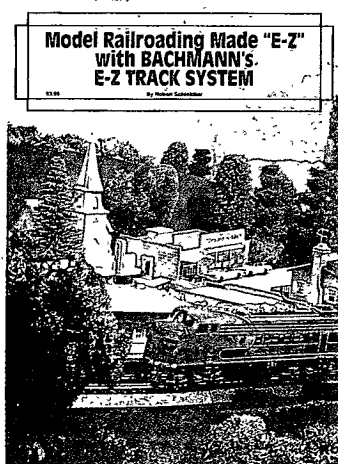
Remote Switch - Left



18" Radius Curved Track

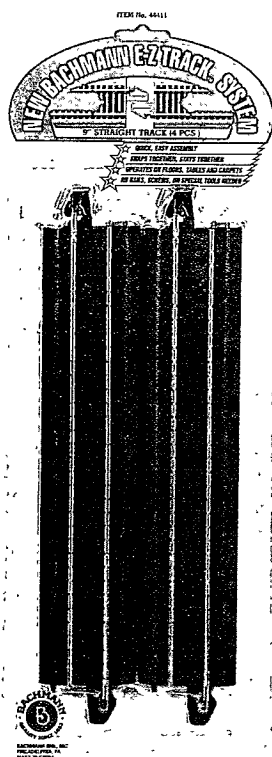
## The E-Z Track™ System Expands in 1995!

More track options. More layout flexibility. And more railroading fun! As we expand the E-Z Track™ System in 1995 with additional separate sale items, your ability to build interesting and realistic railroads is dramatically increased. The E-Z Track™ System already offers complete set-up of simple layouts in fifteen minutes or less. For quick-starts on more challenging E-Z Track™ railroads as well, we recommend a new book authored by Robert Schleicher detailing three layouts and twenty track plans. The E-Z Track™ book, shown below, also offers useful assembly tips that are sure to get your E-Z Track™ railroad running right on schedule. Now that's the way to run a railroad!

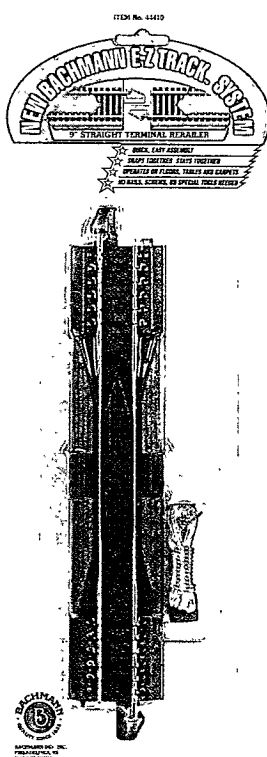


**E-Z Track™ Manual**  
with Instructions and Track Plans  
Item No. 99979  
\$3.95

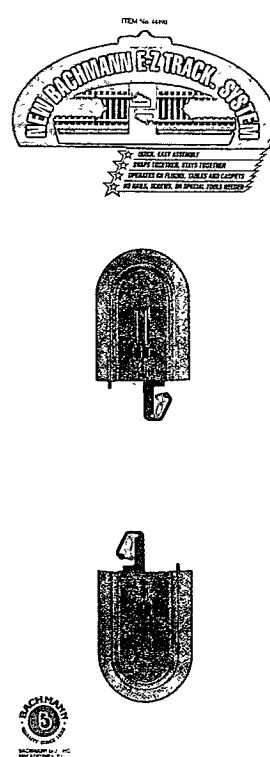
# BACHMANN's E-Z Track™ System...Now that's the way to run a railroad!



9" Straight Track



9" Straight  
Terminal Railer



Bumpers

## HO Scale E-Z Track™ — Snap Fit Steel Track with Black Roadbed

### Track by the Card

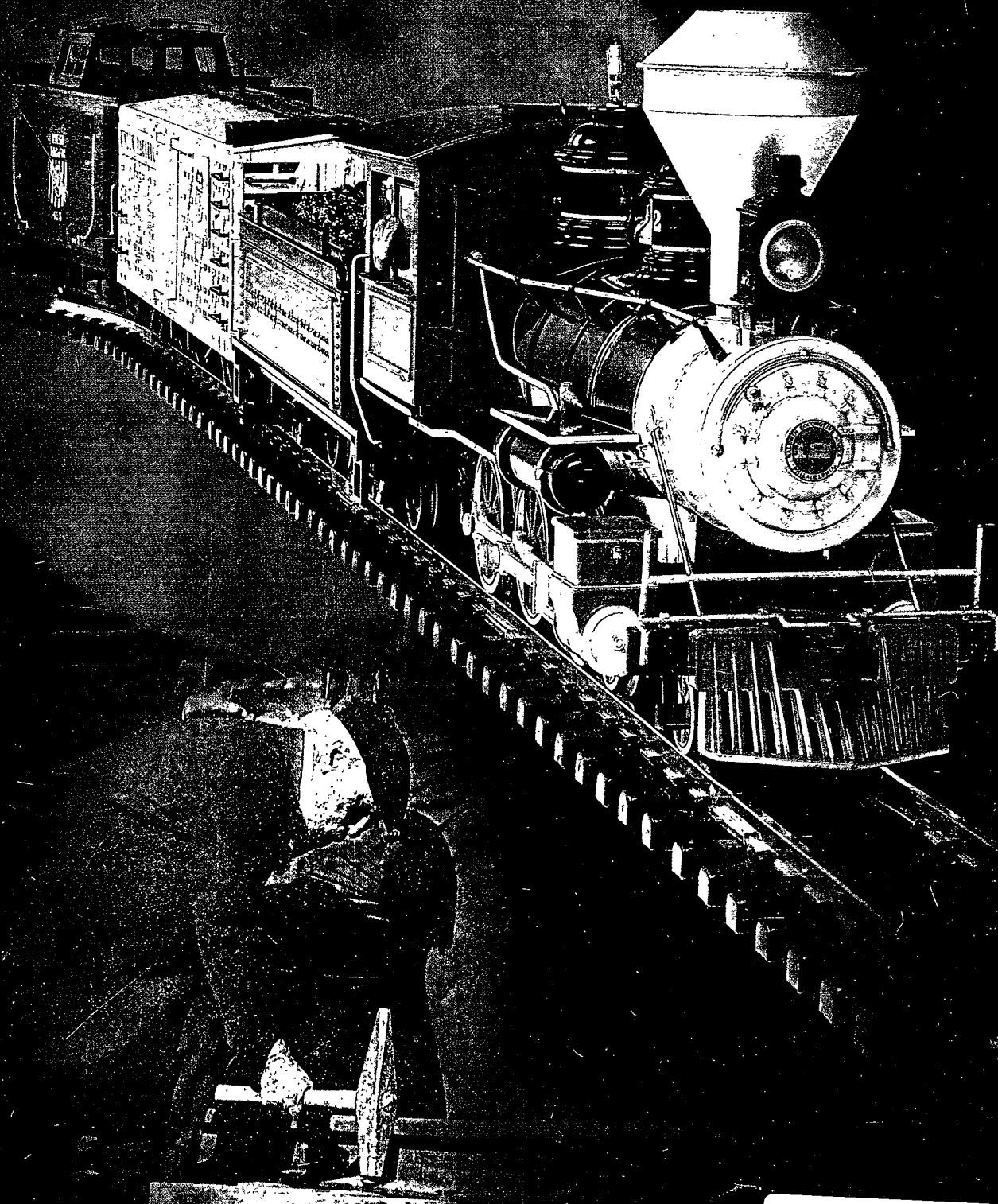
		Standard Pack: 12
Item No. 44401	18" Radius Curved Track (4 per card)	\$5.00
Item No. 44402	18" Radius Terminal Railer with Wire (1 per card)	\$4.00
Item No. 44403	22" Radius Curved Track (4 per card)	\$5.00
Item No. 44410	9" Straight Terminal Railer with Wire (1 per card)	\$4.00
Item No. 44411	9" Straight Track (4 per card)	\$5.00
Item No. 44412	3" Straight Track (4 per card)	\$4.00
Item No. 44440	30° Crossing (1 per card)	\$4.00
Item No. 44461	Remote Switch - Left (1 per card)	\$10.00
Item No. 44462	Remote Switch - Right (1 per card)	\$10.00
Item No. 44490	Bumpers (2 per card)	\$6.00

### Track by the Carton

		Standard Pack: 1
Item No. 44480	18" Radius Curved Track (50 per carton)	\$1.00 each
Item No. 44481	9" Straight Track (50 per carton)	\$1.00 each



# **EXHIBIT 19**



BI 0063

**BACHMANN TRAINS... Guaranteed Fun For a Lifetime. \$5.00**

**HO**  
Scale

**ELECTRIC TRAIN SETS**

**THE CANNONBALL EXPRESS™, an E-Z Track™ set  
with Motorized Hand Car**

Item No. 00625    Standard Pack: 6

SET CONTAINS

**137**

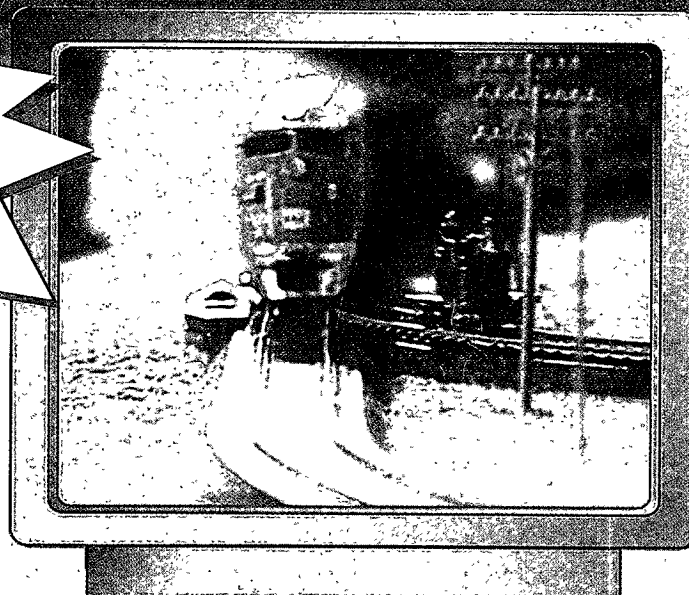
PIECES!





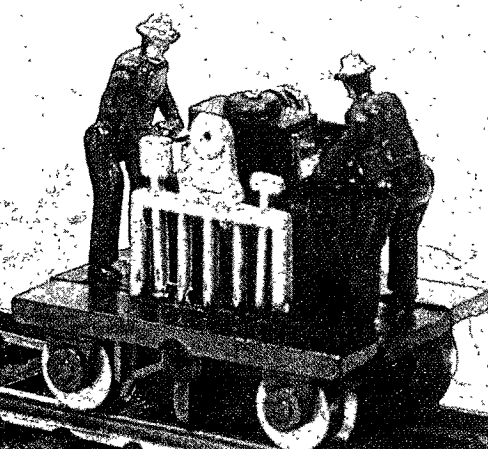
BACHMANN'S E-Z TRACK™ SYSTEM... NOW THAT'S THE WAY TO RUN A RAILROAD!

NEW  
ON TV  
IN 1996!



It's a Blast! Looking like it was shot from a cannon, this set's powered hand car races furiously to escape an oncoming train. Complete with full train, hand car, and two switches, the *Cannonball Express™* features Bachmann's exclusive *E-Z Track™* snap-fit track and roadbed system, plus:

- an F9 diesel locomotive with *Lustra Chrome* finish and operating headlight
- powered hand car
- gondola
- open quad hopper
- plug door box car
- steel off-center caboose
- 65" x 38" oval *E-Z Track™* set with left-hand and right-hand manual switches, 16 pieces curved track, 3 pieces straight track and 1 plug-in terminal rerailer
- 36 telephone poles
- 48 figures
- 24 railroad and street signs
- UL listed power pack
- and illustrated "Bach-Man" instruction manual





**HO**  
Scale

## ELECTRIC TRAIN SETS

### The Galaxy<sup>®</sup> an E-Z Track<sup>™</sup> set

Item No. 00610      Standard Pack: 6

Reflecting the wonders of the heavens in its full *Lustra Chrome* finish, the Galaxy's engine glints brightly in the moonlight as it presses on with its load. The Galaxy comes complete with Bachmann's exclusive E-Z Track<sup>™</sup> snap-fit track and roadbed system, plus:



AS SEEN  
ON TV

SET CONTAINS  
79 PIECES!  
Includes 24 Signs,  
12 Telephone Poles  
& 24 Figures

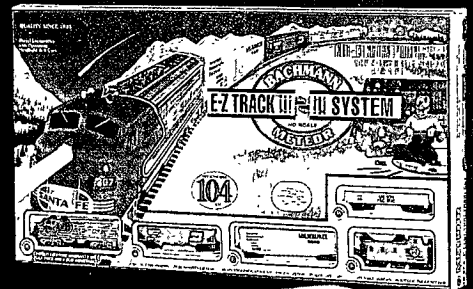
- an F9 diesel locomotive with full *Lustra Chrome* finish and operating headlight
- open quad hopper
- plug door box car
- steel off-center caboose
- 47" x 38" oval E-Z Track<sup>™</sup> set with 12 pieces of curved track, 1 piece of straight track and 1 plug-in terminal rerailer track
- 24 figures
- 12 telephone poles
- 24 railroad and street signs
- UL listed power pack
- and illustrated "Bach Man" instruction manual

BACHMANN'S E-Z TRACK™ SYSTEM... NOW THAT'S THE WAY TO RUN A RAILROAD!

## The Meteor, an E-Z Track™ Set

Item No. 00611     Standard Pack 6

As if in salute, a sudden streak of light crosses the sky as the Meteor races through the night. The favor is returned with a flash from the locomotive's headlight! This set comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:



AS SEEN  
ON TV

SET CONTAINS

104 PIECES!

Includes 24 Signs,  
24 Telephone Poles  
& 36 Figures

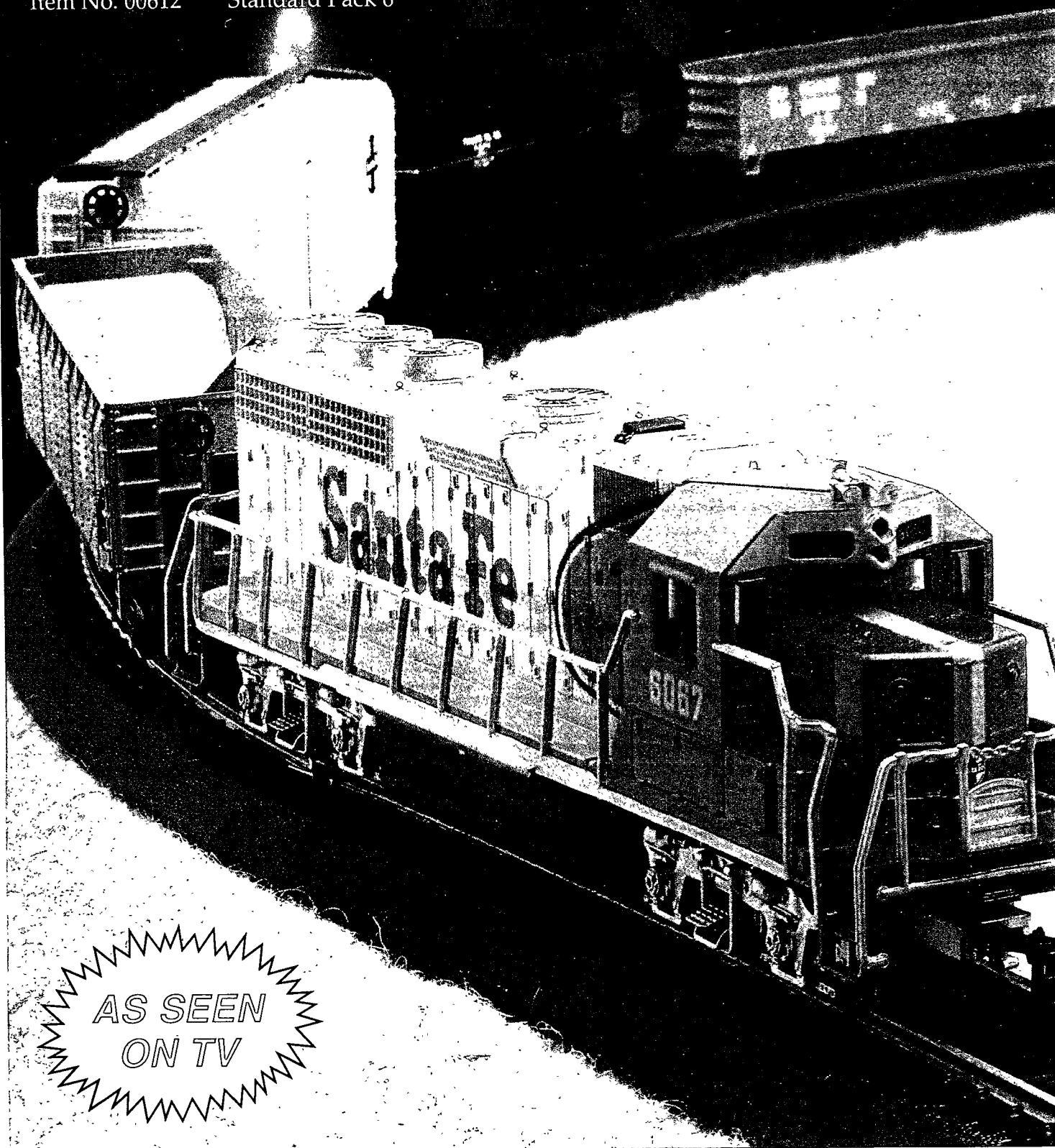
• an F9 diesel locomotive with full Lustra Chrome finish and operating headlight • gondola • open quad hopper • plug door box car • steel off-center caboose • 47" x 38" oval E-Z Track™ set with 12 pieces of curved track, 1 piece of straight track and 1 plug-in terminal rerailer track • 36 figures • 24 telephone poles • 24 railroad and street signs • UL listed power pack • and illustrated "Bach Man" instruction manual

**HO**  
Scale

**ELECTRIC TRAIN SETS**

# The Thunderbolt, an E-Z Track™ set

Item No. 00612     Standard Pack 6



AS SEEN  
ON TV

BI 0070

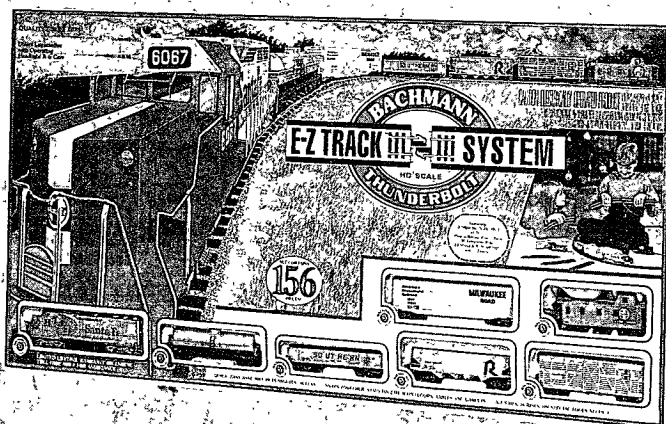
Hold on tight! The distant roar and trembling earth can only mean one thing the Thunderbolt is on its way. This set comes complete with Bachmann's exclusive *E-Z Track™* snap-fit track and roadbed system, plus:

- a GP40 diesel locomotive with operating headlight
- open quad hopper
- plug door box car
- gondola
- single dome tank car
- wood stock car
- steel off-center caboose
- 56" x 38" oval *E-Z Track™* set with 12 pieces of curved track, 3 pieces of straight track and 1 plug-in terminal rerailer track,
- 48 figures
- 36 telephone poles
- 48 railroad and street signs
- UL listed power pack
- and illustrated "Bach Man" instruction manual

**SET CONTAINS**

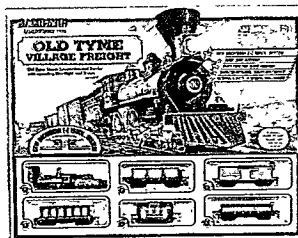
**156 PIECES!**

Includes 48 Signs,  
36 Telephone Poles  
& 48 Figures



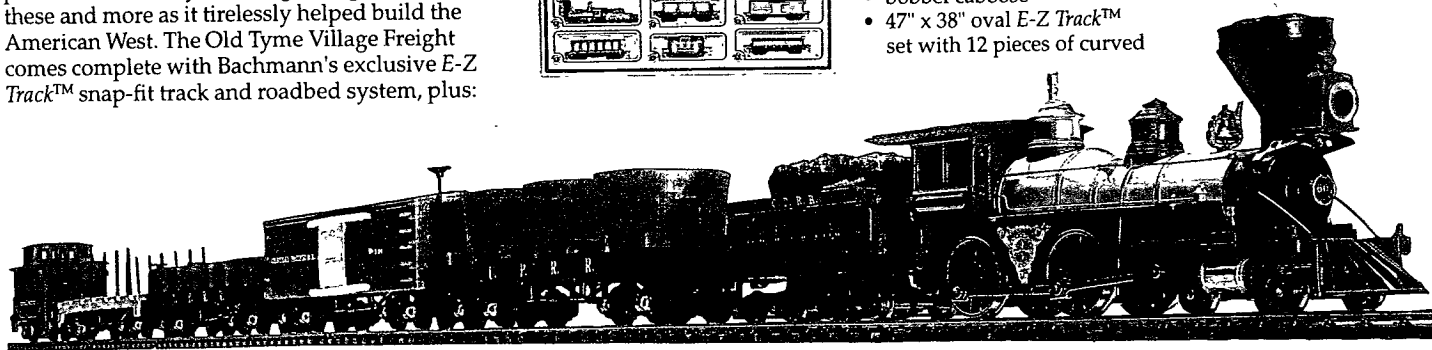
### Old Tyme Village Freight, an E-Z Track™ Set

Item No. 00604 Standard Pack: 6  
Towering mountains, searing deserts and lonely prairies. The Old Tyme Village Freight faced all these and more as it tirelessly helped build the American West. The Old Tyme Village Freight comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:



- an American 4-4-0 steam locomotive and tender with operating headlight
- water tank car
- box car
- wood gondola
- flat car
- bobber caboose
- 47" x 38" oval E-Z Track™ set with 12 pieces of curved

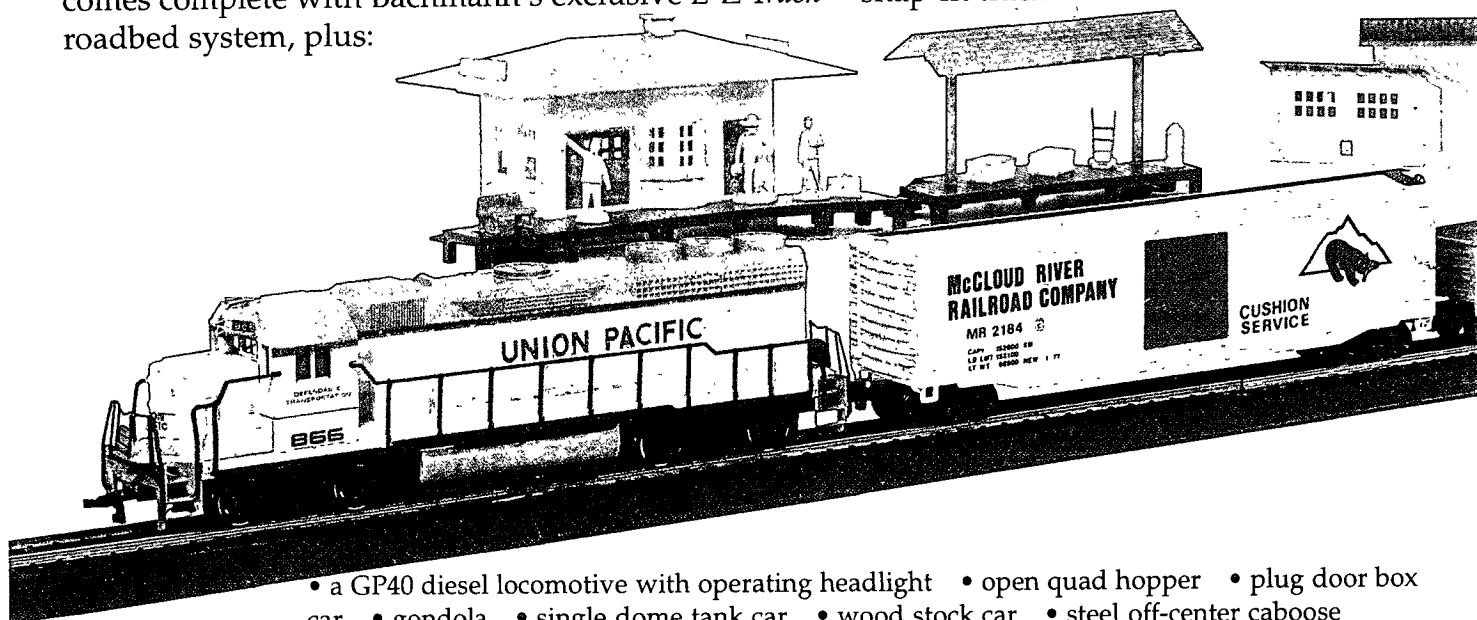
- track, 1 piece of straight track and 1 plug-in terminal rerailer track
- UL listed power pack
- and illustrated "Bach Man" instruction manual



### The Golden Star, an E-Z Track™ set

Item No. 00608 Standard Pack: 3

This set not only gives you a fantastic train, it also gives you an instant rural community! A train station, farm buildings, barn, silo, school house and signal bridge are ready for quick assembly into a picturesque layout. The Golden Star comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:



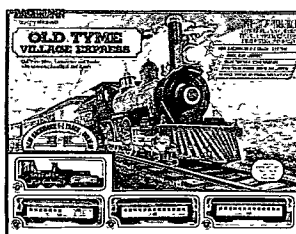
- a GP40 diesel locomotive with operating headlight
- open quad hopper
- plug door box car
- gondola
- single dome tank car
- wood stock car
- steel off-center caboose
- 56" x 38" oval E-Z Track™ set with 12 pieces of curved track, 3 pieces of straight track and 1 plug-in terminal rerailer track
- suburban station
- farm building set
- barn with silo
- school house
- signal bridge
- picket fence set
- park assortment
- 48 figures
- 24 telephone poles
- 48 railroad and street signs
- UL listed power pack
- and illustrated "Bach Man" instruction manual

**BACHMANN'S E-Z TRACK™ SYSTEM... NOW THAT'S THE WAY TO RUN A RAILROAD!**

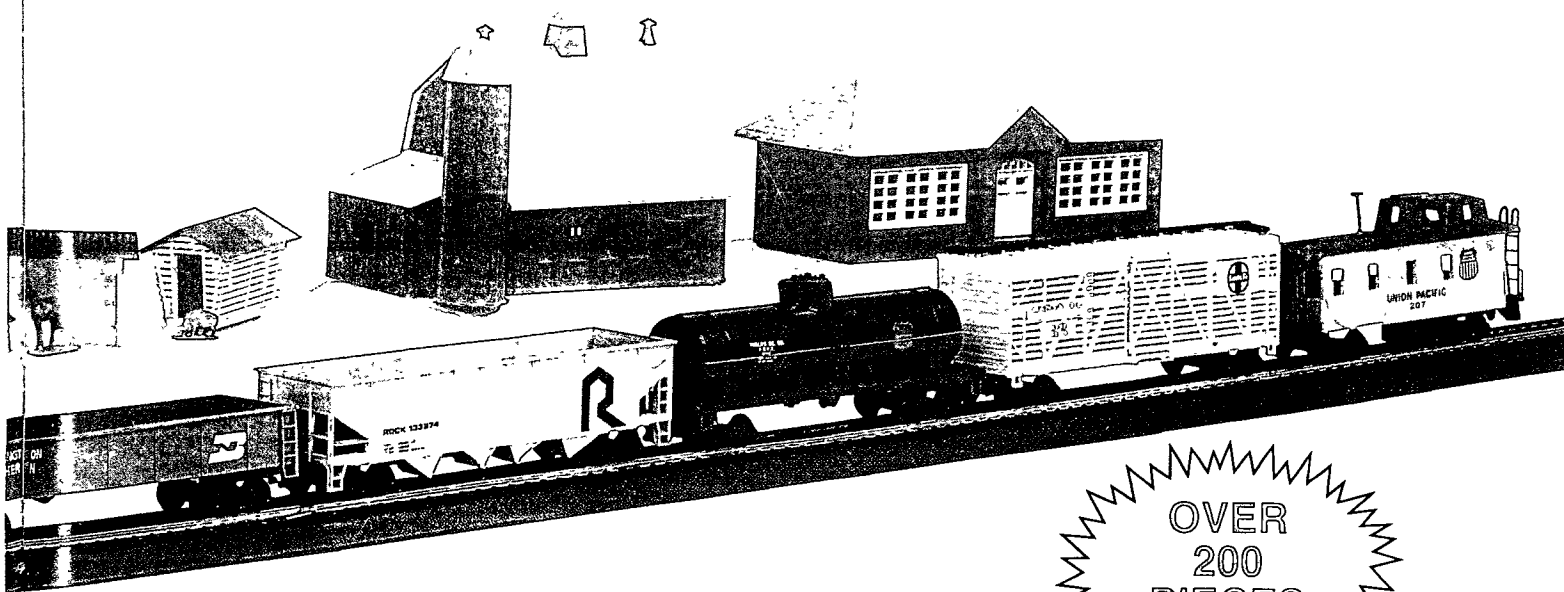
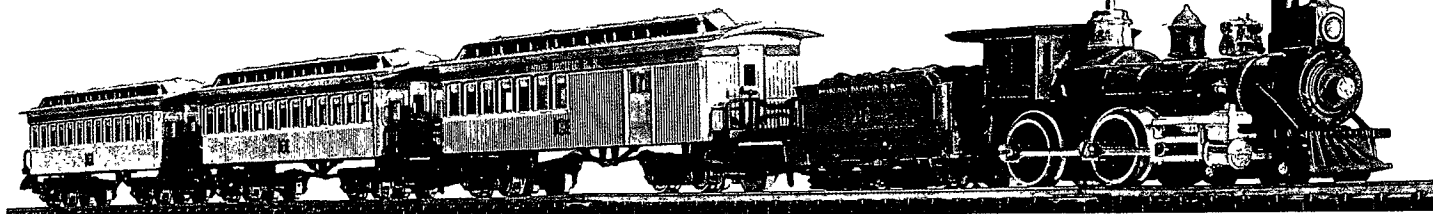
## Old Tyme Village Express, an E-Z Track™ Set

Item No. 00605 Standard Pack: 6

Climb aboard and travel back to the Wild West of the 1800's on the Old Tyme Village Express. The Old Tyme Village Express set comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:

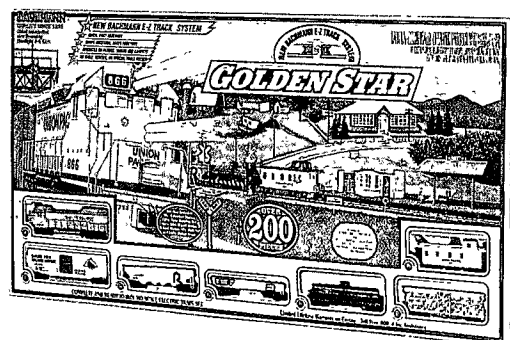


- an American 4-4-0 steam locomotive and tender with operating headlight
- old time combine
- 2 old time coach cars
- 47" x 38" oval E-Z Track™ set with 12 pieces of curved track, 1 piece of straight track and 1 plug-in terminal rerailer track
- UL listed power pack
- and illustrated "Bach Man" instruction manual



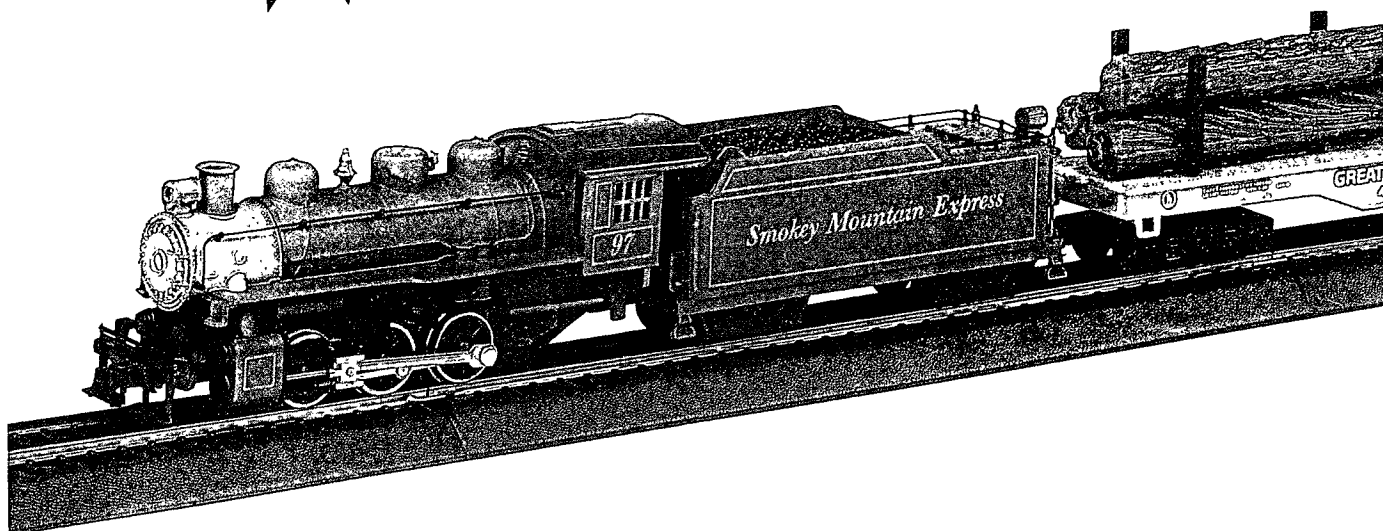
OVER  
200  
PIECES

AS SEEN  
ON TV



BI 0073



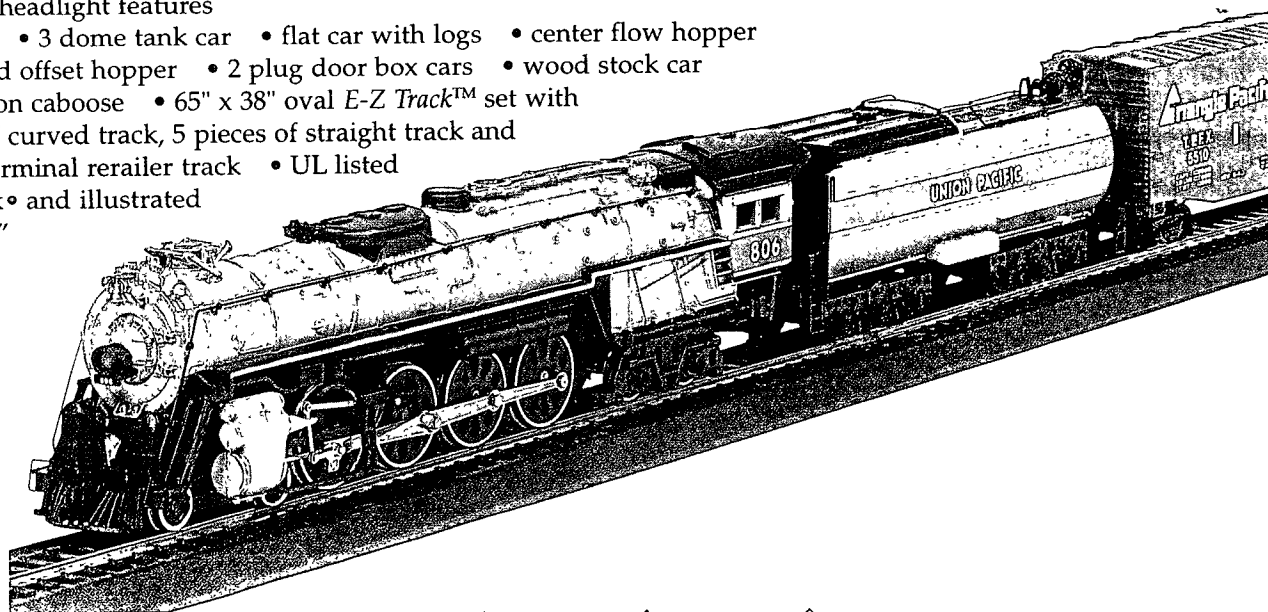


## Overland Limited, an E-Z Track™ set

Item No. 00614      Standard Pack: 6

The biggest and the best for the serious railroad enthusiast. From a powerful 4-8-4 steam locomotive, to an impressive consist of nine cars, this set has it all! The Overland Limited comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:

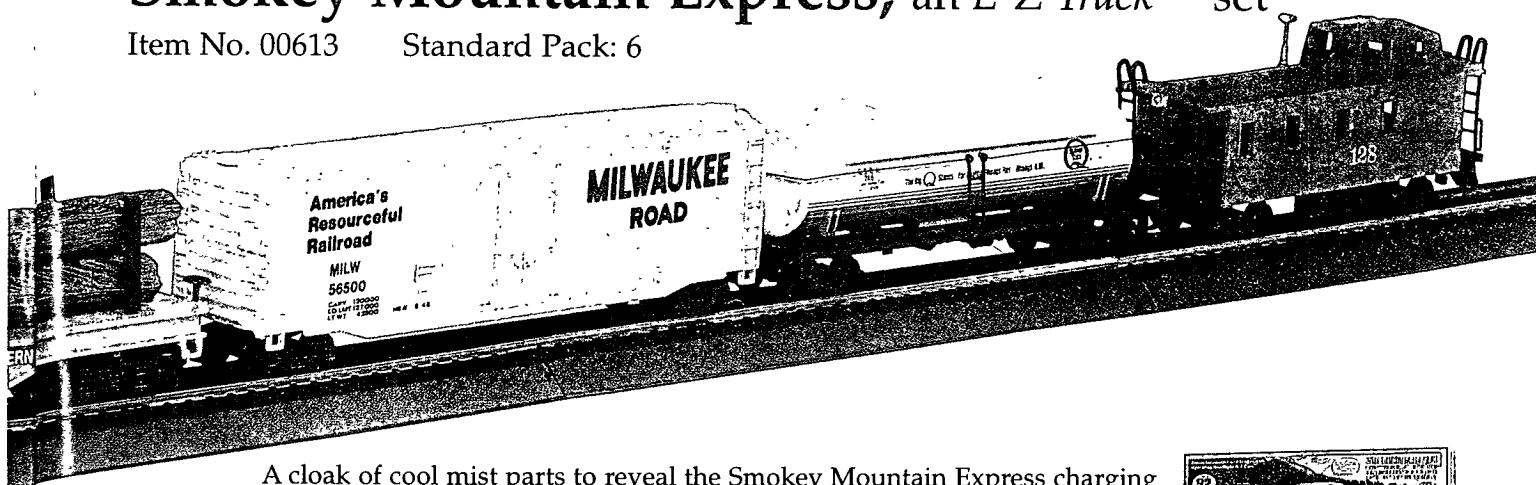
- a Union Pacific Overland 4-8-4 steam locomotive and tender with operating smoke and headlight features
  - grain car    • 3 dome tank car    • flat car with logs    • center flow hopper
  - open quad offset hopper    • 2 plug door box cars    • wood stock car
  - wide vision caboose    • 65" x 38" oval E-Z Track™ set with
- 12 pieces of curved track, 5 pieces of straight track and  
1 plug-in terminal rerailer track    • UL listed  
power pack • and illustrated  
"Bach Man"  
instruction  
manual



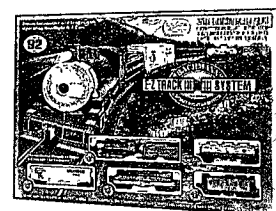
**BACHMANN'S E-Z TRACK™ SYSTEM... NOW THAT'S THE WAY TO RUN A RAILROAD!**

# Smokey Mountain Express, an E-Z Track™ set

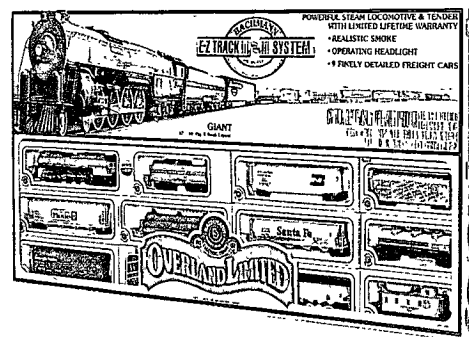
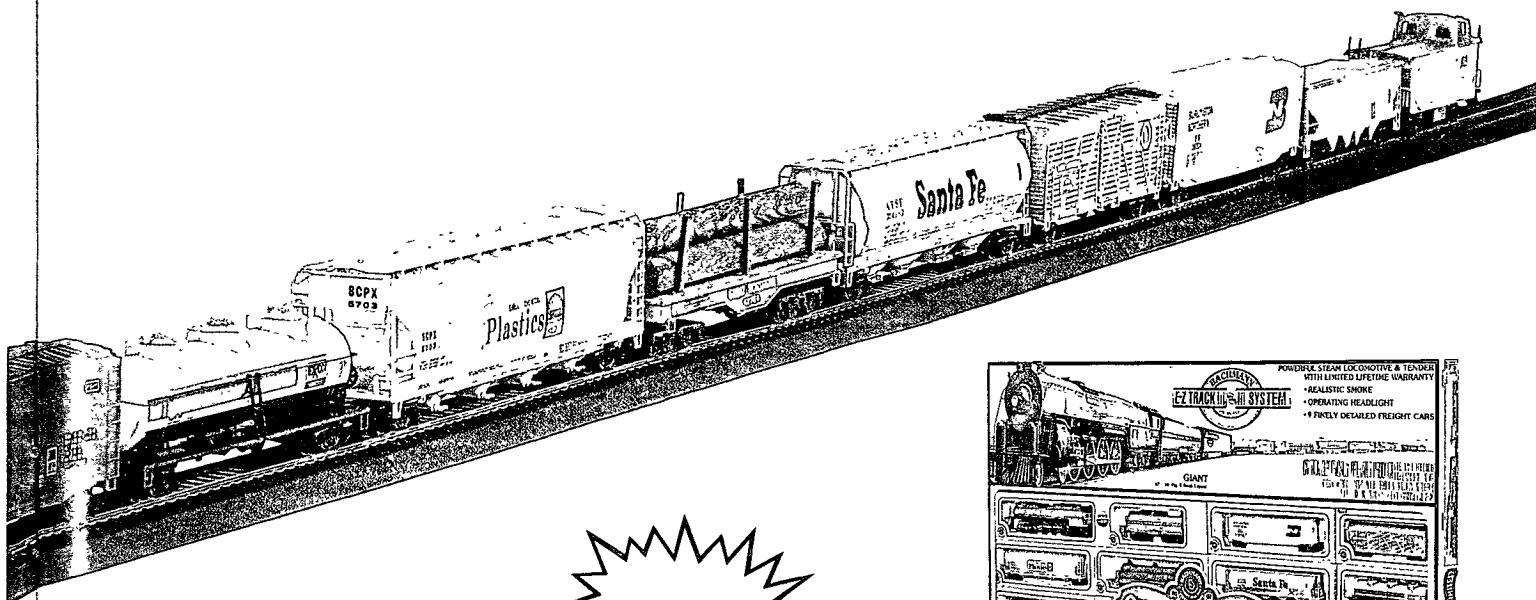
Item No. 00613      Standard Pack: 6



A cloak of cool mist parts to reveal the Smokey Mountain Express charging toward the pass! With their deep forest green colors, the locomotive and tender are in perfect harmony with the mountains. The Smokey Mountain Express comes complete with Bachmann's exclusive E-Z Track™ snap-fit track and roadbed system, plus:



- an 0-6-0 steam locomotive and short haul tender with operating headlight
- plug door box car • flat car with logs • 3 dome tank car • steel off-center caboose
- 47" x 38" oval E-Z Track™ set with 12 pieces of curved track, 1 piece of straight track and 1 plug-in terminal rerailer track
- 24 figures
- 24 telephone poles • 24 railroad and street signs • UL listed power pack
- and illustrated "Bach Man" instruction manual

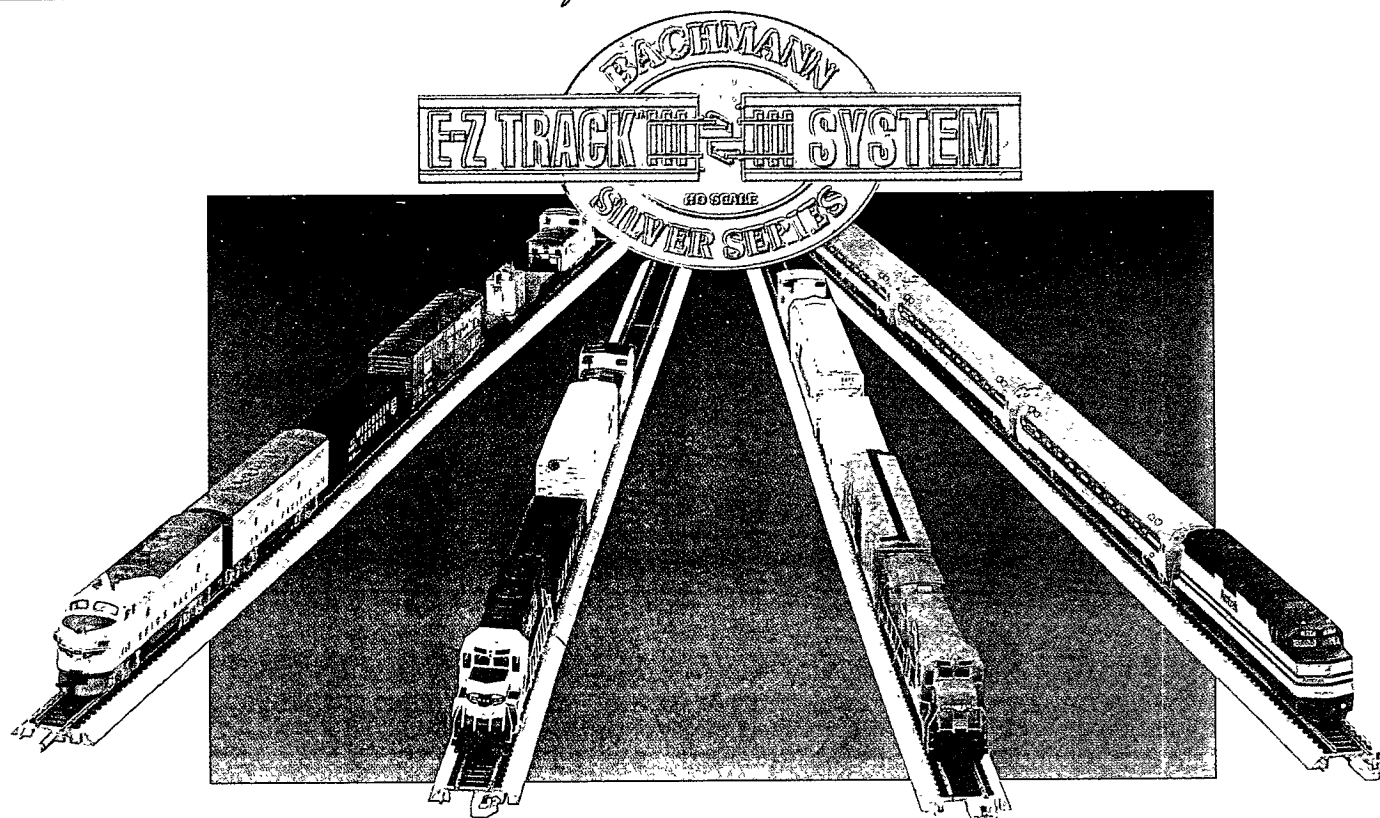




**HO**  
Scale

## PREMIUM SILVER SERIES™ ELECTRIC TRAIN SETS

*The best way to start a railroad*



**THE SILVER SERIES SETS FEATURE OUR EXCLUSIVE LIFETIME LIMITED WARRANTY ON ALL MECHANICAL COMPONENTS**

### **THE PATRIOT, a Silver Series™ set**

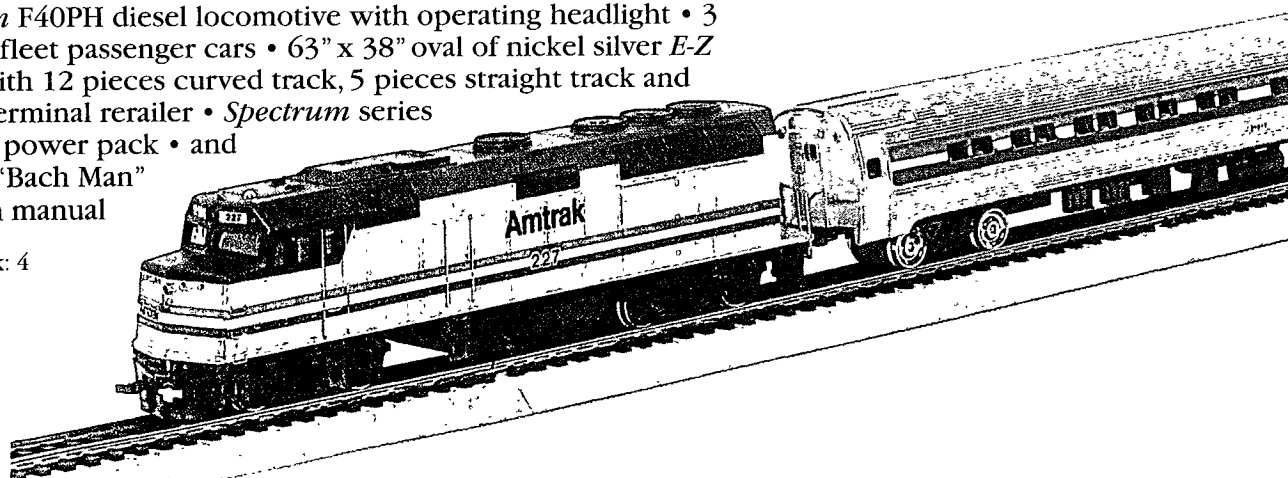
ITEM NO. 01104

In honor of Amtrak's named passenger service between Washington, D.C. and Boston, Massachusetts, our *Patriot* features all-premium components including Bachmann's exclusive nickel silver *E-Z Track™* snap-fit track and roadbed system, plus:

- *Spectrum* F40PH diesel locomotive with operating headlight • 3 lighted Amfleet passenger cars • 63" x 38" oval of nickel silver *E-Z Track™* with 12 pieces curved track, 5 pieces straight track and 1 plug-in terminal rerailer • *Spectrum* series "Magnum" power pack • and illustrated "Bach Man" instruction manual

Standard Pack: 4

**AS SEEN  
ON TV**



# BACHMANN'S E-Z TRACK™ SYSTEM... NOW THAT'S THE WAY TO RUN A RAILROAD!

## The Silver Series™ Story

The *Silver Series*™ gives you all premium options when beginning a new railroad. Featuring components of exceptional quality, the *Silver Series* sets offer the finest in railroading enjoyment "right out of the box." From motive power and power pack, to rolling stock and E-Z Track™, the *Silver Series* offers the ultimate in quality and performance.

*Silver Series* quality begins with a heavy duty *Spectrum*™ power pack and a selection of superior locomotives. Of *Bachmann Plus*™- and *Spectrum*-quality, the *Silver Series* locomotives feature five pole skew-wound motors, dual flywheels and diode directional lighting (where applicable). Following the *Silver Series* locomotives, you'll find all-upgraded rolling stock with blackened metal wheels, non-magnetic axles and body mounted couplers.

The *Silver Series* sets are completed with Bachmann's exclusive nickel silver E-Z Track™ with gray roadbed. Acclaimed as the most important innovation in years in model railroading, E-Z Track is the snap-fit track and roadbed system that gets trains up and running in just minutes. Use of nickel silver E-Z Track ensures highly efficient electrical conductivity and smooth operating performance.

The *Silver Series* begins with four new sets. They are the *Mountaineer*, *Trail Blazer*, *Pioneer* and *Patriot*.

Choose one of these sets for the highest-quality components, E-Z Track convenience, and a great start in model railroading!

## Track

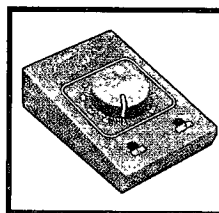
- ♦ Nickel silver E-Z Track™ with gray roadbed
- ♦ Easy assembly in 15 minutes or less
- ♦ Plug-in wiring

## Motive Power

- ♦ 5 pole skew-wound motor
- ♦ Dual flywheels
- ♦ Diode directional lighting (where applicable)
- ♦ Painted crew figures

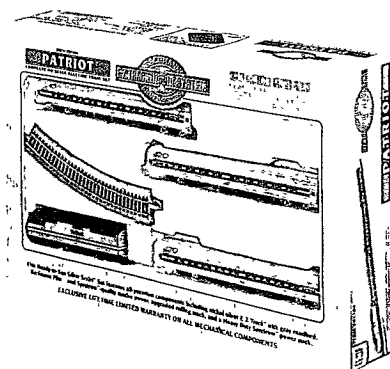
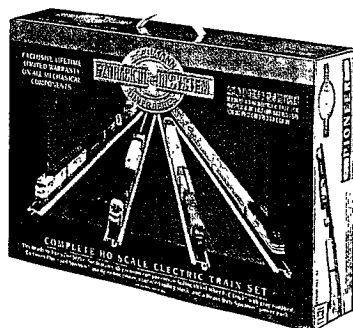
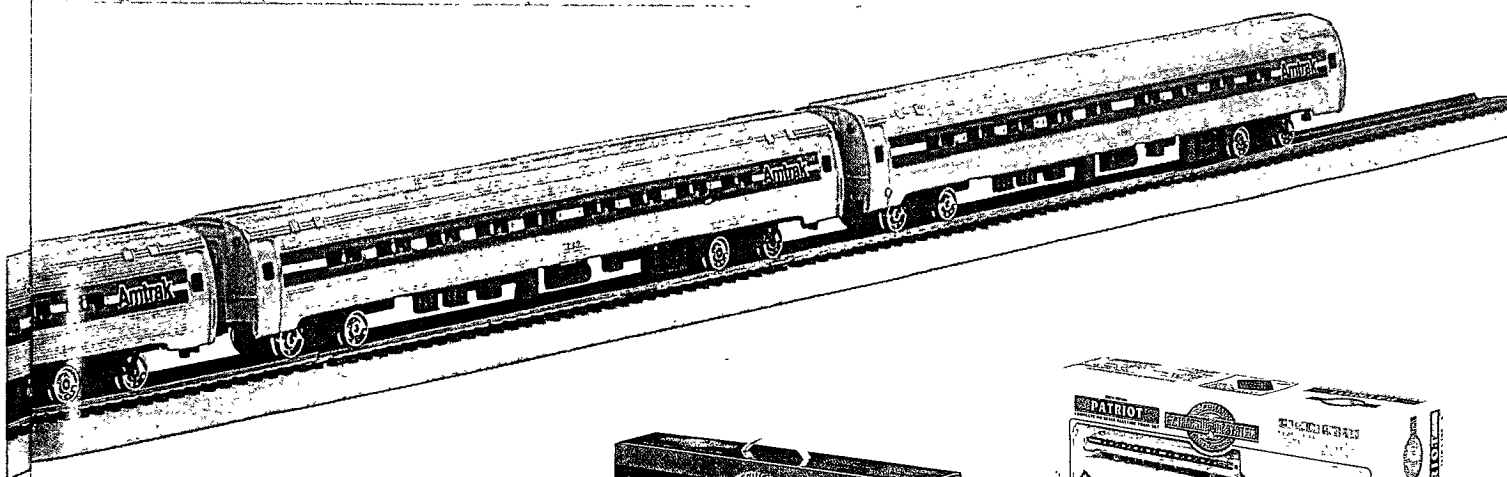
## Rolling Stock and Accessories

- ♦ Blackened metal wheels, body mounted couplers and non-magnetic axles on all freight cars
- ♦ Heavy gauge 3' terminal wire with plug-in connections



## *Spectrum* Power Pack

Sets come complete with a Heavy Duty *Spectrum*™ Power Pack with transistorized potentiometer speed control



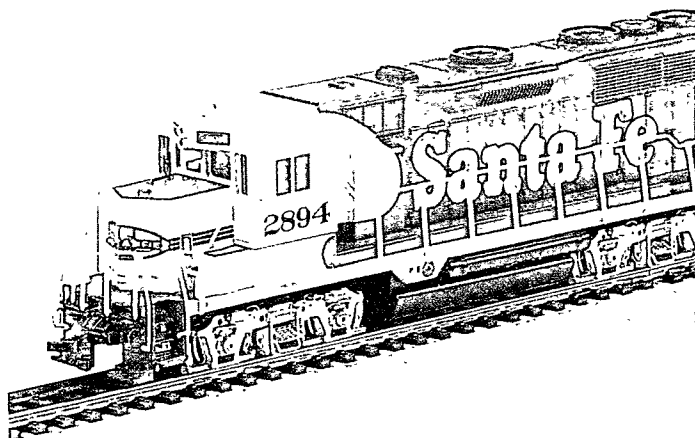
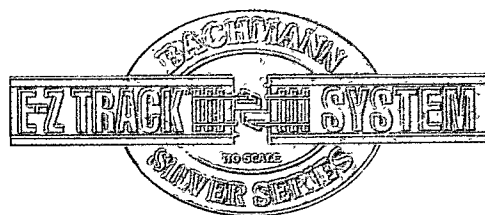
BI 0077

### THE MOUNTAINEER, a *Silver Series™* set ITEM NO. 01101

To haul your freight from the deepest valley to the Continental divide, you can count on the mighty Mountaineer. This set features all-premium components including Bachmann's exclusive nickel silver *E-Z Track™* snap-fit track and roadbed system, plus:

- *Bachmann Plus* GP35 diesel locomotive with operating headlight • gondola • reefer • extended vision caboose • 47" x 38" oval of nickel silver *E-Z Track™* with 12 pieces curved track, 1 piece straight track and 1 plug-in terminal railer • *Spectrum* series "Magnum" power pack • and illustrated "Bach Man" instruction manual

Standard Pack: 4

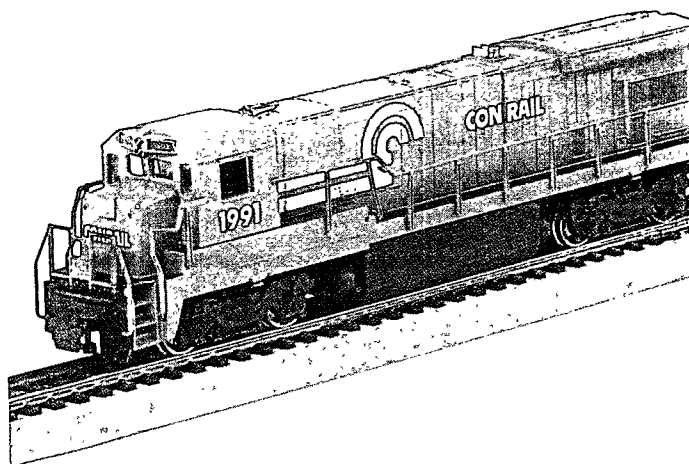


### THE TRAIL BLAZER, a *Silver Series™* set ITEM NO. 01102

True to its name, the *Trail Blazer* makes quick work of lonely horizons and long distance travel. This set features all-premium components including Bachmann's exclusive nickel silver *E-Z Track™* snap-fit track and roadbed system, plus:

- *Bachmann Plus* B23-7 diesel locomotive with operating headlight • center flow hopper • open quad hopper • reefer • extended vision caboose • 56" x 38" oval of nickel silver *E-Z Track™* with 12 pieces curved track, 3 pieces straight track and 1 plug-in terminal railer • *Spectrum* series "Magnum" power pack • and illustrated "Bach Man" instruction manual

Standard Pack: 4

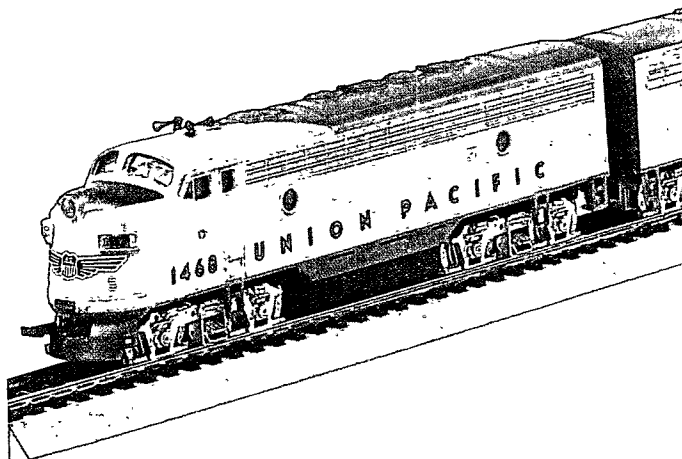


### THE PIONEER, a *Silver Series™* set ITEM NO. 01103

Freight to build a nation is pulled by the *Pioneer*. This set features all-premium components including Bachmann's exclusive nickel silver *E-Z Track™* snap-fit track and roadbed system, plus:

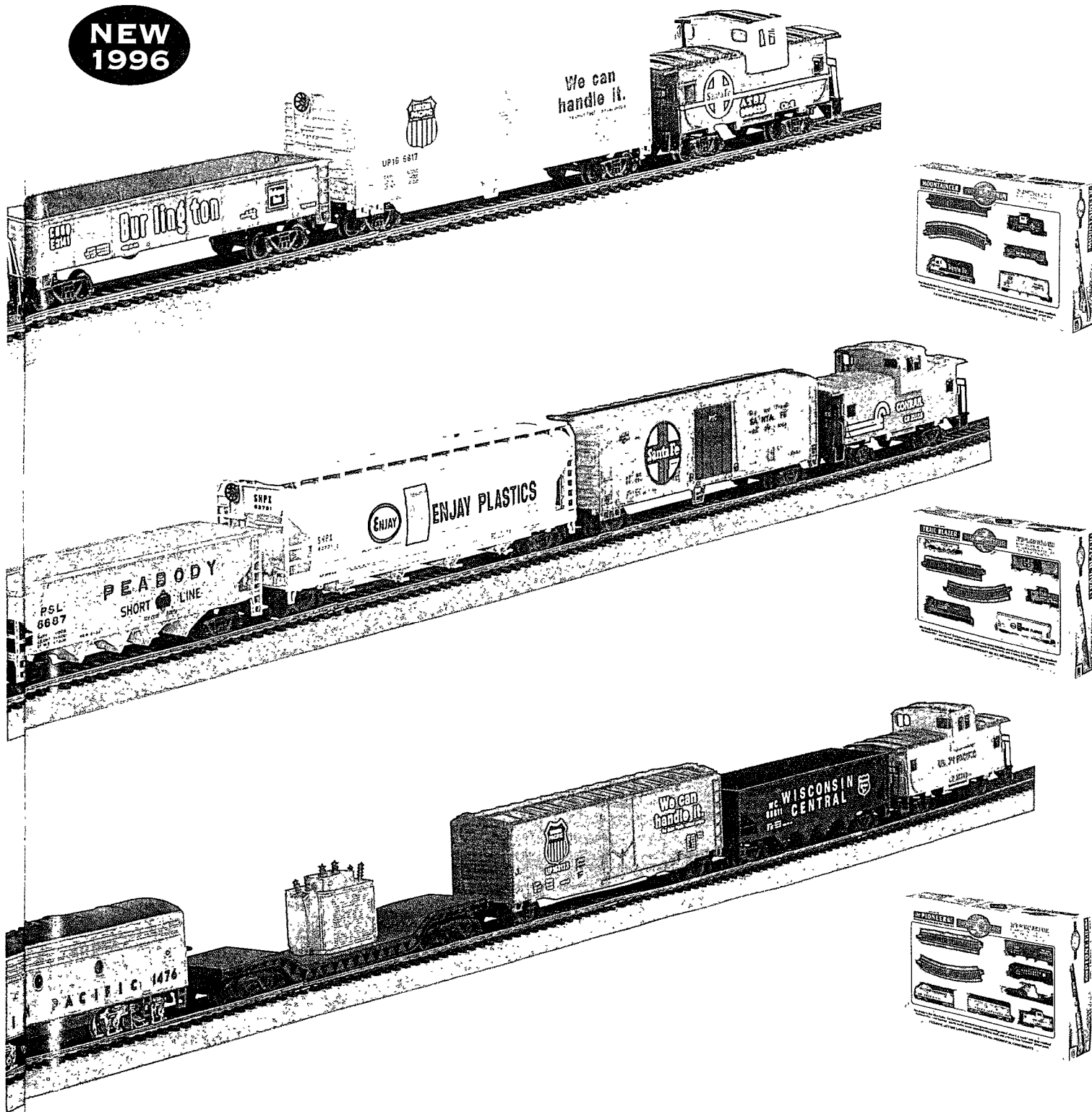
- powered *Bachmann Plus* F7A unit with operating headlight • unpowered *Bachmann Plus* F7B unit • open quad hopper • plug door box car • depressed center flat car with transformer • extended vision caboose • 56" x 38" oval of nickel silver *E-Z Track™* with 12 pieces curved track, 3 pieces straight track and 1 plug-in terminal railer • *Spectrum* series "Magnum" power pack • and illustrated "Bach Man" instruction manual

Standard Pack: 4



**BACHMANN'S E-Z TRACK™ SYSTEM... NOW THAT'S THE WAY TO RUN A RAILROAD!**

**NEW  
1996**

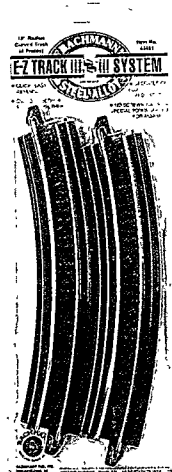


**AS SEEN  
ON TV**

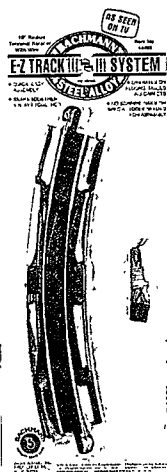
© Bachmann Industries, Inc. All rights reserved. E-Z Track patent pending. Bachmann and E-Z Track are registered trademarks of Bachmann Industries. The configuration of the E-Z Track product is a registered trademark of Bachmann Industries. Any infringers will be halted in their "tracks".

BI 0079

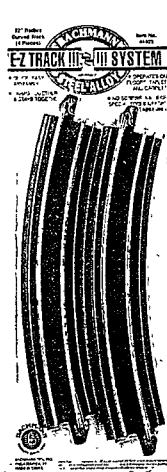
## E-Z TRACK™ SNAP FIT STEEL TRACK WITH BLACK ROADBED



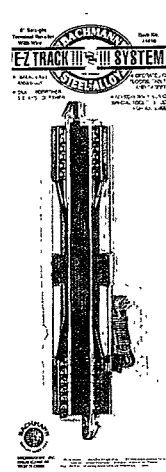
ITEM NO. 44401



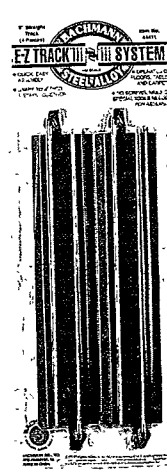
ITEM NO. 44402



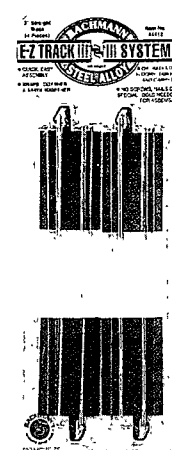
ITEM NO. 44403



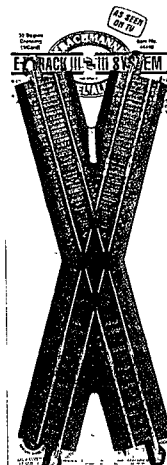
ITEM NO. 44410



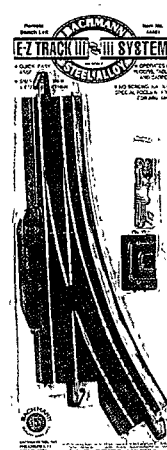
ITEM NO. 44411



ITEM NO. 44412



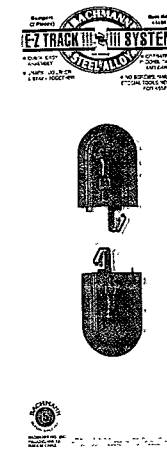
ITEM NO. 44440



ITEM NO. 44461



ITEM NO. 44462

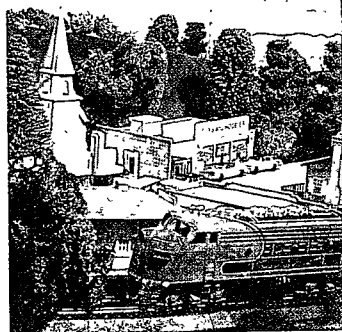


ITEM NO. 44490

Model Railroading Made "E-Z"  
with BACHMANN'S  
E-Z TRACK™ SYSTEM

\$3.95

By Robert Schellinger



E-Z TRACK™ MANUAL #1  
with Instructions and Track Plans  
ITEM NO. 99979 \$3.95

Bachmann's exclusive *E-Z Track™* System  
makes set-up quick, easy and fun!

### STEEL E-Z TRACK™ BY THE CARD

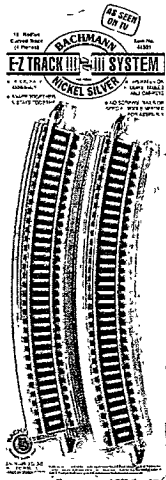
ITEM NO. 44401	18" RADIUS CURVED TRACK (4/CARD)	\$5.00
ITEM NO. 44402	18" RADIUS TERMINAL RERAILER W/WIRE (1/CARD)	\$4.00
ITEM NO. 44403	22" RADIUS CURVED TRACK (4/CARD)	\$6.00
ITEM NO. 44410	9" STRAIGHT TERMINAL RERAILER W/WIRE (1/CARD)	\$4.00
ITEM NO. 44411	9" STRAIGHT TRACK (4/CARD)	\$5.00
ITEM NO. 44412	3" STRAIGHT TRACK (4/CARD)	\$4.00
ITEM NO. 44440	30 DEGREE CROSSING (1/CARD)	\$4.00
ITEM NO. 44461	REMOTE SWITCH - LEFT (1/CARD)	\$10.00
ITEM NO. 44462	REMOTE SWITCH - RIGHT (1/CARD)	\$10.00
ITEM NO. 44490	BUMPERS (2/CARD)	\$6.00

### Standard Pack:

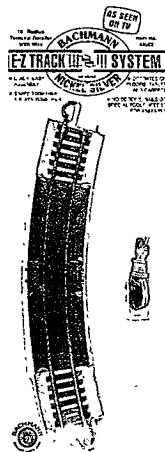
### STEEL E-Z TRACK™ BY THE CARTON

ITEM NO. 44480	18" RADIUS CURVED TRACK - BULK (CARTON OF 50 PCS)	\$50.00
ITEM NO. 44481	9" STRAIGHT TRACK - BULK (CARTON OF 50 PCS)	\$50.00

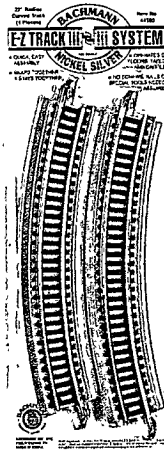
### Standard Pack:

NEW  
1996

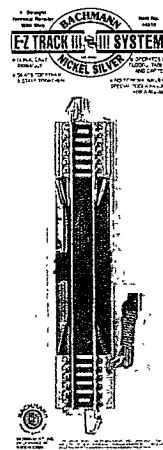
ITEM NO. 44501



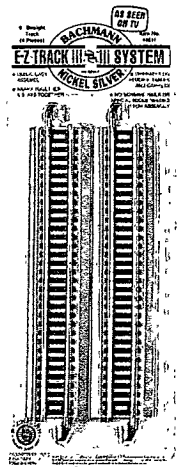
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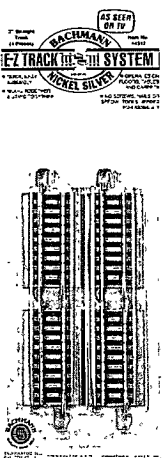
ITEM NO. 44503



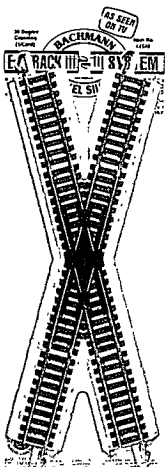
ITEM NO. 44510



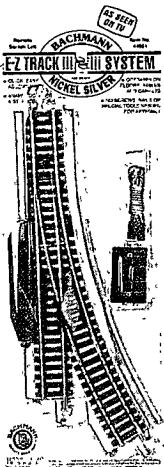
ITEM NO. 44511



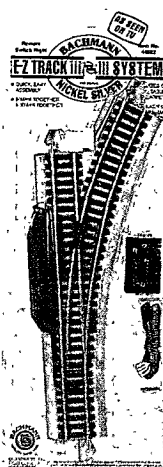
ITEM NO. 44512



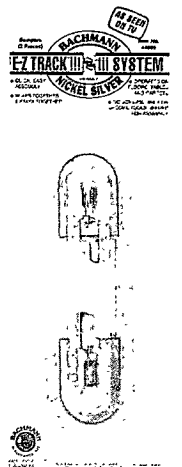
ITEM NO. 44540



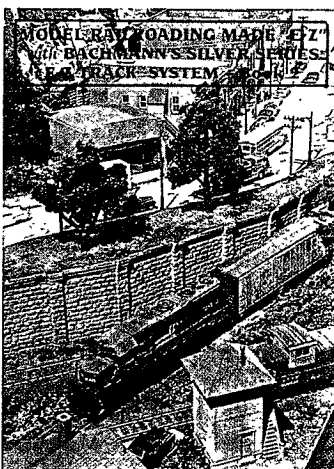
ITEM NO. 44561



ITEM NO. 44562



ITEM NO. 44590



NICKEL SILVER  
E-Z TRACK™ MANUAL #2  
with Instructions and Track Plans  
ITEM NO. 99978 \$5.00

The Best Snap-Fit Track and Roadbed System Just Got Better —  
We Now Offer Nickel Silver E-Z Track™ with Gray Roadbed!

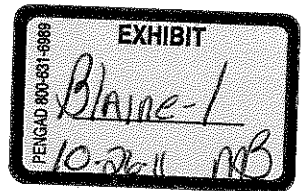
## NICKEL SILVER E-Z TRACK™ BY THE CARD

		Standard Pack: 12
ITEM NO. 44501	18" RADIUS CURVED TRACK (4/CARD)	\$7.50
ITEM NO. 44502	18" RADIUS TERMINAL RERAILER W/WIRE (1/CARD)	\$5.00
ITEM NO. 44503	22" RADIUS CURVED TRACK (4/CARD)	\$8.50
ITEM NO. 44510	9" STRAIGHT TERMINAL RERAILER W/WIRE (1/CARD)	\$5.00
ITEM NO. 44511	9" STRAIGHT TRACK (4/CARD)	\$7.50
ITEM NO. 44512	3" STRAIGHT TRACK (4/CARD)	\$5.00
ITEM NO. 44540	30 DEGREE CROSSING (1/CARD)	\$6.00
ITEM NO. 44561	REMOTE SWITCH - LEFT (1/CARD)	\$15.00
ITEM NO. 44562	REMOTE SWITCH - RIGHT (1/CARD)	\$15.00
ITEM NO. 44590	BUMPERS (2/CARD)	\$7.00

## NICKEL SILVER E-Z TRACK™ BY THE CARTON

		Standard Pack: 1
ITEM NO. 44580	18" RADIUS CURVED TRACK - BULK (CARTON OF 50 PCS)	\$75.00
ITEM NO. 44581	9" STRAIGHT TRACK - BULK (CARTON OF 50 PCS)	\$75.00

# **EXHIBIT 20**



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X  
BACHMANN INDUSTRIES, INC., :  
 :  
Petitioner/Counterclaim Respondent, :  
 :  
v. : Cancellation No.: 92053426  
 :  
SCIENTIFIC TOYS, LTD., :  
 :  
Respondent/Counterclaim Petitioner. :  
-----X

**NOTICE TO TAKE DEPOSITION PURSUANT TO  
FED. R. CIV. P. 30(a)(1), 30(b)(6) and 37 C.F.R. § 2.120(b)**

Please take notice that pursuant to Fed. R. Civ. P. 30(a)(1), 30(b)(6) and 37 C.F.R. § 2.120(b), Respondent/Counterclaim Petitioner Scientific Toys, Ltd. ("Respondent") will take the deposition by oral examination of Petitioner/Counterclaim Respondent Bachmann Industries, Inc. ("Petitioner") by:

(a) Douglas C. Blaine, Vice President of Marketing; and

(b) the person(s) designated to testify on its behalf with respect to the topics listed below, commencing at 10:00 a.m. on October 26, 2011, at the offices of Eckert Seamans Cherin & Mellott, LLC, 2 Liberty Place, 50 S. 16<sup>th</sup> Street, 22<sup>nd</sup> floor, Philadelphia, PA 19102 before a notary public or other person authorized to administer oaths, or at such other location as will be mutually agreed upon. The deposition shall be recorded by stenographic means, and the deposition will continue from day to day until completed. You are invited to attend and cross examine the witness(s).

**Definitions**

As used herein, the following terms have the following definitions:



1. "Petitioner" means Bachmann Industries, Inc., its agents, legal representatives, predecessors, and assigns, as well as its divisions, parent or subsidiary entities, affiliates, and related companies, as well as its officers, directors, employees, and agents.
2. "Respondent" means Scientific Toys, Ltd.
3. "E-Z Mark" means the mark which is the subject of U.S. Trademark Registration No. 2,225,724 (the "'724 Registration").
4. "E-Z TRACK Mark" means the mark which is the subject of U.S. Trademark Registration No. 3,222,737 (the "'737 Registration").
5. "E-Z MATE Mark" means the mark which is the subject of U.S. Trademark Registration No. 2,195,884 (the "'884 Registration").
6. "E-Z LUBE Mark" means the mark which is the subject of U.S. Trademark Registration No. 2,247,669 (the "'669 Registration").
7. "Alleged Family of E-Z Marks" means the collection of marks identified in paragraph 9 of the Petition for Cancellation, namely E-Z, E-Z TRACK, E-Z MATE and E-Z LUBE.

#### **Topics**

1. Use of each mark in the Alleged Family of E-Z Marks.
2. The date the E-Z Mark was first used by itself on toy train sets, toy trains, accessories for toy trains, namely toy train tracks; and couplers for toy railway carriages.
3. Use of the mark comprised of "E-Z" by itself and not as part of the E-Z TRACK mark, E-Z MATE mark, E-Z LUBE mark, or any other mark including the term "E-Z" followed by any other word or word fragment.

4. The dollar value of sales of each product bearing a mark comprised of the term “E-Z” by itself for each year since use commenced.
5. The amount spent on advertising goods utilizing the mark “E-Z” per se.
6. Advertisements using the term “E-Z” per se.
7. The use of the term “E-Z” or any variation thereof by third parties, including “EASY” in conjunction with toys.
8. The assertion of rights by Petitioner against other entities using the term “E-Z” or any variation thereof, including “EASY,” in conjunction with toys.
9. Advertisements using all of the Alleged Family of E-Z Marks.
10. Advertisements utilizing more than one mark in the Alleged Family of E-Z Marks.
11. The channels of trade for each of Petitioner’s goods sold under any of the Alleged Family of E-Z Marks.
12. Promotion of Petitioner’s goods using the Alleged Family of E-Z Marks.
13. The identification of those documents previously produced by Petitioner which purportedly show the common exposure of the marks in the Alleged Family of E-Z Marks.
14. The purported recognition by the public that goods bearing any mark in the Alleged Family of E-Z Marks come from a common origin.
15. The contention that Respondent’s use of the mark EZTEC is likely to cause confusion, mistake or deception of the relevant trade and public as to the source of goods or the sponsorship or the relationships between Respondent and Petitioner.
16. The allegation that members of the relevant public and trade seeing Respondent’s mark used on or in conjunction with Respondent’s goods would be likely to believe that such

goods are Petitioner's goods or made under license from Petitioner or that Respondent and Petitioner are otherwise affiliated.

17. The factual basis for the allegations of Petitioner set forth in the Petition for Cancellation.

18. The factual basis for the response by Petitioner to the Counterclaim to Cancel asserted by Respondent in Petitioner's Answer to Counterclaim to Cancel.

19. The identification of documents already produced by Petitioner which show use of a mark comprised of "E-Z" alone in conjunction with toy train sets.

20. The identification of documents already produced by Petitioner which show use of a mark comprised of "E-Z" alone in conjunction with toy trains.

21. The identification of documents already produced by Petitioner which show use of a mark comprised of "E-Z" alone in conjunction with toy train tracks.

22. Any instances of actual confusion between goods sold by Petitioner under any mark in its Alleged Family of E-Z Marks and goods sold by Respondent under the mark EZTEC.

23. Any surveys conducted by Petitioner relative to any mark in the Alleged Family of E-Z Marks.

24. The license agreements relating to marks in Petitioner's Alleged Family of E-Z Marks.

25. Petitioner's use of the mark comprised of "E-Z" alone in conjunction with toy train sets on or about December 31, 1997.

26. Petitioner's use of the mark comprised of "E-Z" alone in conjunction with toy trains on or about December 31, 1997.

27. Petitioner's use of the mark comprised of "E-Z" alone in conjunction with toy train tracks on or about December 31, 1997.

28. The steps taken by Petitioner on or about December 31, 1997 to determine whether it had made actual use of the mark comprised of "E-Z" alone in conjunction with toy train sets.

29. The steps taken by Petitioner on or about December 31, 1997 to determine whether it had made actual use of the mark comprised of "E-Z" alone in conjunction with toy trains.

30. The steps taken by Petitioner on or about December 31, 1997 to determine whether it had made actual use of the mark comprised of "E-Z" alone in conjunction with toy train tracks

31. Petitioner's use of a mark comprised of "E-Z" alone on or about September 28, 2004 in conjunction with toy train sets.

32. Petitioner's use of a mark comprised of "E-Z" alone on or about September 28, 2004 in conjunction with toy trains

33. Petitioner's use of a mark comprised of "E-Z" alone on or about September 28, 2004 in conjunction with toy train tracks.

34. The nature of the investigation conducted by Petitioner on or about September 28, 2004 to determine if a mark comprised of "E-Z" alone was then used in conjunction with toy train sets.

35. The nature of the investigation conducted by Petitioner on or about September 28, 2004 to determine if a mark comprised of "E-Z" alone was then used in conjunction with toy trains.

36. The nature of the investigation conducted by Petitioner on or about September 28, 2004 to determine if a mark comprised of "E-Z" alone was then used in conjunction with toy train tracks.

37. Use of a mark comprised of "E-Z" alone by Petitioner on or about January 26, 2009 in conjunction with toy train sets.

38. Use of a mark comprised of "E-Z" alone by Petitioner on or about January 26, 2009 in conjunction with toy trains.

39. Use of a mark comprised of "E-Z" alone by Petitioner on or about January 26, 2009 in conjunction with toy train tracks.

40. The investigation conducted by Petitioner on or about January 26, 2009 to determine if a mark comprised of "E-Z" alone was then used in connection with toy train sets by Petitioner.

41. The investigation conducted by Petitioner on or about January 26, 2009 to determine if a mark comprised of "E-Z" alone was then used in connection with toy trains by Petitioner.

42. The investigation conducted by Petitioner on or about January 26, 2009 to determine if a mark comprised of "E-Z" alone was then used in connection with toy train tracks by Petitioner.

43. The identification of materials already produced showing use of the mark "E-Z" alone in conjunction with toy train sets, toy trains and toy train tracks.

44. Petitioner's use of the mark E-Z RIDER.

45. Materials supplied to any person who will testify on behalf of Petitioner as an expert.

Respectfully submitted,

AMSTER, ROTHSTEIN & EBENSTEIN LLP  
Attorneys for Scientific Toys, Ltd.  
90 Park Avenue  
New York, New York 10016  
(212) 336-8000

Dated: New York, New York  
October 6, 2011

By: 

Neil M. Zipkin  
Chester Rothstein  
Holly Pekowsky

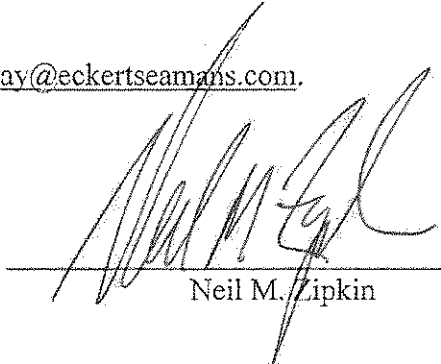
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is one of the attorneys for Respondent/Counterclaim Petitioner Scientific Toys, Ltd., in the above-captioned cancellation proceeding and that on the date which appears below, he caused a copy of the foregoing NOTICE TO TAKE DEPOSITION PURSUANT TO FED. R. CIV. P. 30(a)(1), 30(b)(6) and 37 C.F.R. § 2.120(b) to be served on the attorneys for Petitioner/Counterclaim Respondent Bachmann Industries, Inc. by (1) first class mail by causing a copy thereof to be placed in a depository under the care and custody of the United States Postal Service, in the State of New York, postage pre-paid, in a wrapper addressed as follows:

Roberta Jacobs-Meadway, Esq.  
Eckert Seamans  
Two Liberty Place  
50 South 16th Street, 22d floor  
Philadelphia, PA 19102

and (2) e-mail addressed as follows:

[rjacobsmeadway@eckertseamans.com](mailto:rjacobsmeadway@eckertseamans.com)

  
\_\_\_\_\_  
Neil M. Zipkin

Dated: New York, New York  
October 6, 2011



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

----- -X

BACHMANN INDUSTRIES, INC.,	:	
	:	
Petitioner/Counterclaim Respondent,	:	
	:	
v.	:	Cancellation No.: 92053426
	:	
SCIENTIFIC TOYS, LTD.,	:	
	:	
Respondent/Counterclaim Petitioner.	:	
-----	-X	

**RESPONDENT/COUNTERCLAIM PETITIONER SCIENTIFIC TOYS' REPLY  
IN SUPPORT OF ITS CROSS-MOTIONS FOR SUMMARY JUDGMENT**



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## I. INTRODUCTION

Scientific Toys has cross-moved for summary judgment on three separate grounds:

1. Bachmann did not have a family of marks at the time Scientific Toys commenced use of EZTEC on toys;
2. Bachmann does not have priority and there is no confusing similarity between Scientific Toys' EZTEC mark and the individual marks purportedly in the family of marks pleaded by Bachmann; and
3. Based primarily on dissimilarity of appearance, weakness of the common "EZ" portions and the many years of concurrent use without actual confusion, there is no confusing similarity between E-Z TRACK and EZTEC.

## II. DISCUSSION

### A. **Bachmann Has Failed to Raise a Genuine Issue of Material Fact and Scientific Toys Is Entitled to Partial Summary Judgment That Bachmann Cannot Assert an Alleged Family of "E-Z" Marks Against the EZTEC Registration**

Bachmann's opposition to Scientific Toys' cross-motion for summary judgment that Bachmann did not have a family of E-Z marks at the time Scientific Toys commenced use of its EZTEC mark fails to raise a genuine issue. There is no dispute that Scientific Toys commenced use of the EZTEC mark in conjunction with the goods recited in U.S. Trademark Registration No. 3,567,168 (the "168 Registration") for "toys, namely, remote controlled, radio controlled, and battery operated vehicles, trains, train sets, helicopters, submarines, boats, musical instruments, pinball machines, animals, and insects" on July 20, 1996 as recited in the registration and as established by the Declaration of Louis Chan (Chan Decl. at ¶¶ 4, 5 and Chan Decl. Ex. 1, submitted with Scientific Toys' cross-motion). Bachmann does not dispute this date and instead argues, albeit erroneously, that it can ignore the July 1996 date of first use of the EZTEC mark for toys and instead dissect the listed goods and focus only on toy trains, which

were not sold until 1998. Bachmann's attempt to dissect the goods recited in Scientific Toys' '168 Registration is impermissible and done without citing any legal authority.

This dissection is not only unsupported by the law, but is inconsistent with the pleadings. Bachmann's Petition repeatedly refers to "the goods identified in the registration." (*See* Petition for Cancellation at ¶¶ 16, 17, 18, 20.) The goods identified in the registration are "toys, namely, remote controlled, radio controlled, and battery operated vehicles, trains, train sets, helicopters, submarines, boats, musical instruments, pinball machines, animals, and insects." The date of first use of the EZTEC mark on "toys, namely, remote controlled, radio controlled, and battery operated vehicles, trains, train sets, helicopters, submarines, boats, musical instruments, pinball machines, animals, and insects" is July 1996 and such date is established by the Declaration of Louis Chan and corroborated by copies of a June 1996 Purchase Order showing the sale of goods bearing the EZTEC mark in commerce with the United States at that time. Thus, July 20, 1996 is the date that must be used for priority purposes.

Bachmann has raised no genuine issue of material fact as to priority.

In order to assert rights to a family of "E-Z" marks, Bachmann must prove that prior to Scientific Toys' first use of its mark, Bachmann had established its family. *Citigroup v. Capital City Bank Group Inc.*, 94 U.S.P.Q.2d 1645, 1655 (TTAB 2010). One or two marks do not constitute a family.

Bachmann claims rights to a family comprised of E-Z TRACK, E-Z, E-Z MATE, E-Z LUBE, E-Z COMMAND and possibly E-Z RIDERS.<sup>1</sup> It has not submitted evidence of first use of E-Z MATE, E-Z LUBE, E-Z COMMAND or E-Z RIDERS. Thus, it must rely on the filing dates of these registrations as the constructive dates of first use. 15 U.S.C. § 1507(c). These

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<sup>1</sup> The registration for E-Z RIDERS was not pleaded. Scientific Toys continues its objection.

four marks all have a constructive date of first use subsequent to July 20, 1996.<sup>2</sup> For the purpose of this cross-motion, Scientific Toys will concede that use of the E-Z TRACK mark commenced in 1994.

Bachmann, contrary to the evidence and its prior admissions, now contends that the mark E-Z was also used in 1994. However, Bachmann has submitted no credible evidence of use of E-Z as a trademark prior to December 31, 1997, the filing date of Bachmann's pleaded Registration No. 2,225,724 for the E-Z mark.<sup>3</sup>

Instead, Bachmann now argues that use of E-Z TRACK prior to December 31, 1997 constitutes use of E-Z per se. Although a party may claim rights to only a portion of a composite mark, in order to do so that portion must create a separate and distinct commercial impression when displayed in the composite mark, i.e. that separate mark must indicate the source of applicant's goods or services and distinguish the goods and services from those of others. "If the portion of the mark sought to be registered does not create a separate and distinct commercial impression, the result is an impermissible mutilation of the mark as used." *In re Mastronardi Produce* (Ser. No. 77322943) (TTAB Sept. 21, 2011) (non-precedential), citing *In re Miller Sports*, 51 U.S.P.Q.2d 1059 (TTAB 1999).

Although often whether a portion of a mark creates a separate and distinct commercial impression is a factual issue, here there is no issue. First, when Bachmann filed its application to register the mark E-Z in December 1997, it submitted a specimen showing use of the composite mark E-Z MATE on packaging for couplers. The examining attorney rejected such specimen in an Office Action dated May 27, 1998 since the mark on the specimen differed from "E-Z."

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<sup>2</sup> Even the dates of first use recited in the four registrations are later than July 20, 1996.

<sup>3</sup> Scientific Toys may properly challenge the validity of the registration for the E-Z mark since it has cross-petitioned for cancellation of Bachmann's '724 E-Z registration.

Specifically, as memorialized by the examining attorney on July 6, 1998,<sup>4</sup> in a telephone conference with Bachmann's counsel, Bachmann's counsel acknowledged that "the correct mark is imprinted on the goods themselves, though not necessarily on packaging,"<sup>5</sup> thereby demonstrating both the Office's position and counsel's acquiescence that use of E-Z MATE was not use of E-Z per se. Analogously, use of E-Z TRACK is not use of E-Z per se.

More significantly, even if use of E-Z TRACK constitutes use of E-Z per se, the claimed use of E-Z as part of the E-Z TRACK mark does not constitute the use of a second mark in a family that could support a claim to a "family" since that is still only use of one mark. Thus, use of E-Z TRACK alone cannot give rise to "family" rights prior to the admitted use of E-Z by itself in 1997.

It is beyond dispute that E-Z by itself was not used until 1997. Specifically, the interrogatory answers of Bachmann admit that use of E-Z by itself did not commence on any goods until 1997 (Zipkin Decl. Ex. 8; Answer to Int. No. 5). No evidence was submitted by Bachmann showing use of such mark prior to 1997. Thus, Bachmann must rely on the constructive use date of December 31, 1997, the filing date of its registration.

In an improper effort to create a factual issue, paragraph 9 of the Supplemental Declaration of Douglas Blaine submitted by Bachmann in support of Bachmann's Combined Reply and Opposition makes the disingenuous statement that "Listed below are the SKU numbers for products bearing the E-Z mark, sold in 1994, 1995 and 1996." Without exception, the products identified by the SKU numbers are E-Z TRACK products bearing only the E-Z

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<sup>4</sup> A copy of the Office Action dated May 27, 1998 rejecting the specimen and the Memorandum of Telephone Communication are attached as Supplemental Declaration of Neil M. Zipkin ("Suppl. Zipkin Decl.") Ex. 17, submitted herewith. The Office Action states that "The drawing displays the mark as E-Z. However, this differs from the display of the mark on the specimens, where it appears as E-Z MATE." The Office Action and Memorandum are already of record as part of the file history of the '168 Registration for EZTEC and as Exhibits C and D to the Answer and Counterclaim filed by Scientific Toys.

<sup>5</sup> A small "E-Z" is marked on the E-Z MATE couplers. However, use of E-Z MATE did not commence until at least July 8, 1997. Thus, the E-Z would not have been placed on such goods any earlier than July 1997.

TRACK mark. Not a single product uses the term E-Z per se, except SKU 99979 (shown, for example, on p. BI0012 of the Bachmann 1995 catalog),<sup>6</sup> which is an E-Z Track Manual entitled “Model Railroading Made ‘E-Z’ with BACHMANN’S E-Z TRACK SYSTEM.” During his discovery deposition, Mr. Blaine admitted that the E-Z mark never appeared on tracks or on the packaging for train tracks sold by Bachmann. (Zipkin Decl. Ex. 10, Blaine Dep. 36, 39.)<sup>7</sup> Thus, none of these products identified in the Blaine Declaration carry the mark E-Z per se.

Thus, since, at best, Bachmann only used the E-Z TRACK mark prior to Scientific Toys’ first use of the EZTEC mark in July of 1996, Bachmann had no family of marks to assert. The failure by Bachmann to establish that it had used a family of marks prior to Scientific Toys’ first use of the EZTEC mark is fatal to Bachmann’s claim to a family of marks. *Citigroup*, 94 U.S.P.Q.2d at 1657. Consequently, Scientific Toys is entitled to partial summary judgment that Bachmann does not have a family of marks that it can assert against Scientific Toys’ EZTEC registration.

**B. Scientific Toys Is Entitled to Partial Summary Judgment That There Is No Likelihood of Confusion Between EZTEC and the Individual Marks E-Z MATE, E-Z LUBE, E-Z RIDERS or E-Z COMMAND**

As recognized in *Citigroup*, 94 U.S.P.Q.2d at 1657, since Bachmann cannot establish a family of marks, “the likelihood of confusion analysis will be based solely on the use of the individual marks.”

In its opposition to Scientific Toys’ cross-motion, Bachmann does not present any evidence of use of the marks E-Z MATE, E-Z LUBE, E-Z RIDERS or E-Z COMMAND (the

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<sup>6</sup> Copies of the relevant pages of the 1995 and 1996 catalogs of Bachmann showing the products corresponding to the SKU numbers in paragraph 9 of the Supplemental Declaration of Blaine are attached as Exhibits 18 and 19 to the Suppl. Zipkin Decl. The 1994 catalog is not available; however, the same SKU numbers are used in the 1995 and 1996 catalogs for the same products.

<sup>7</sup> Blaine was designated as a Rule 30(b)(6) deposition witness and Bachmann is bound by his discovery deposition testimony. TBMP § 404.06(b). (See Suppl. Zipkin Decl. Ex. 20, Blaine Dep. Ex. 1.)



remaining marks in the alleged E-Z family of marks). Thus, Bachmann must rely upon the filing dates of the various registrations as the constructive date of first use. 15 U.S.C. § 1057(c).

Scientific Toys' date of first use of the EZTEC mark in conjunction with toys, namely, remote controlled, radio controlled, and battery operated vehicles, trains, train sets, helicopters, submarines, boats, musical instruments, pinball machines, animals, and insects is July 20, 1996. The E-Z MATE mark has a constructive date of first use of October 2, 1997; the E-Z LUBE mark of March 27, 1998; the E-Z RIDERS mark of September 22, 2006; and the E-Z COMMAND mark has a constructive date of first use of December 1, 2001.

Therefore, each mark was first used subsequent to Scientific Toys' date of first use.

When determining likelihood of confusion in a cancellation proceeding, the threshold inquiry is priority. Since there is no dispute that Scientific Toys has priority of use, the issue of likelihood of confusion based upon the *DuPont* factors need not be reached. Instead, Scientific Toys is entitled to partial summary judgment that use of its EZTEC mark predates use of each of the other marks.

Nonetheless, if likelihood of confusion were to be considered between EZTEC and each of the other individual marks in the alleged family, as discussed further in Section II.C., *infra*, the difference in appearance is sufficient to find no likelihood of confusion, the "EZ" element in each Bachmann mark is weak based upon its widespread adoption and registration in the toy and hobby field by at least thirty-two others. The combination of such a weak mark with words such as "mate," "lube," "riders" or "command," which are dissimilar in sound, meaning and appearance from the "TEC" portion of Scientific Toys' EZTEC mark (were it permissible to divide Scientific Toys' unitary term EZTEC) create sufficient differences in the overall marks for the public to easily distinguish the marks notwithstanding the presence of the weak common element "EZ." In fact, as recognized by *King Candy v. Eunice King's Kitchen*, 496 F.2d 1400,

1401, 182 U.S.P.Q. 108, 109-110 (CCPA 1974) (finding no confusion between KING'S and MISS KING'S or KATHRYN KING'S and MISS KING'S when used on related goods because of the weakness of the common element "king" or "king's"):

The expressions "weak" and "entitled to limited protection" are but other ways of saying, as the Board went on to recognize in its opinion herein, that confusion is unlikely because the marks are of such non-arbitrary nature or so widely used that the public easily distinguishes slight differences in the marks under consideration as well as differences in the goods to which they are applied, even though the goods of the parties may be considered "related."

The court was influenced by the fact that twenty-three registrations of KING or KING'S "indicate a widespread adoption and registration thereof" (*Id.*). Here there are more than thirty registrations for EZ/EASY marks in the toy field.

**C. Scientific Toys Is Entitled to Partial Summary Judgment That There Is No Likelihood of Confusion Between EZTEC and E-Z TRACK**

Scientific Toys' cross-motion for partial summary judgment that there is no likelihood of confusion between EZTEC and E-Z TRACK is based primarily on three of the factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (CCPA 1973): Dissimilarity of the marks; weakness of the common "EZ" portion based on its suggestiveness and widespread selection and registration by others; and lack of actual confusion over more than fifteen years of concurrent use.

**1. Dissimilarity of the Marks**

As recognized by the Federal Circuit in *Odom's Tenn. Pride Sausage, Inc. v. F.F. Acquisition, LLC*, 600 F.3d 1343, 1346-1347 (Fed. Cir. 2010):

[A] single *DuPont* factor "may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks." *Champagne Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998). Therefore, even if all other relevant *DuPont* factors were considered in [Opposer's] favor, as the board stated, the dissimilarity of the marks was a sufficient basis to conclude that no confusion was likely.

Similarly, in *Cytosport, Inc. v. Comercializa doro de Lácteos y Derivados, S.A. de C.V.*, Opposition No. 91194995 (TTAB Sept. 26, 2011) (non-precedential), the Board considered cross-motions for summary judgment based on similarity or dissimilarity of the respective marks and after considering a number of facts which were not in dispute determined that there was no likelihood of confusion as a matter of law with regard to the opposer's pleaded marks. Summary judgment was granted on the cross-motion filed by applicant dismissing the opposition. Specifically, the Board found that the circumstances of *Cytosport* were similar to those in *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 U.S.P.Q.2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330 (Fed. Cir. 1991) in that the dissimilarity of the marks in their entireties outweighed any other relevant factor and was dispositive.

The present action is also similar to that of *Kellogg*, wherein the Federal Circuit affirmed the Board's dismissal of an opposition based on the dissimilarity of the marks FROOTEE ICE & Design and FRUIT LOOPS. *See also Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 U.S.P.Q.2d 1736 (Fed. Cir. 1989) (affirming Board dismissal of opposition based on dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES); *Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 U.S.P.Q.2d 1227 (TTAB 1992) (dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST was dispositive).

## **2. The Element EZ Is Common in the Toy Field and Weak**

As demonstrated by thirty-two U.S. trademark registrations in the toy field (*see* Zipkin Decl. ¶ 7, Ex. 13) incorporating the term "EZ" or "EASY" for products closely related to toys and toy trains such as plastic toy model hobby craft kits, hobby craft kits, engine powered model

airplanes, model aircraft launchers, and parts of radio controlled model vehicles, it is apparent that such term is suggestive of a toy product that is easy to use.<sup>8</sup>

As recognized in *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 U.S.P.Q.2d 1404, 1405 (TTAB 1988), citing *Tektronix, Inc. v. Daktronics, Inc.*, 189 U.S.P.Q. 693 (CCPA 1976): “The mere presence of a common, suggestive element in two marks is usually not enough support upon which to base a finding that confusion is likely.”

### **3. The Lack of Actual Confusion**

It is undisputed that the parties have both used their respective marks for over fifteen years. No instances of actual confusion have come to the attention of either party. As recognized in *Top Tobacco, LP v. North Atlantic Operating Co., Inc.*, 101 U.S.P.Q.2d 1163 (TTAB 2011), when there has been a significant period of time and reasonable opportunity for confusion to have occurred, “Under such circumstances, the absence of any actual confusion may be probative.” *Id.* citing *Red Carpet Corp.*, 7 U.S.P.Q.2d at 1406-1407; *Central Soya Co., Inc. v. North American Plant Breeders*, 212 U.S.P.Q. 37, 48 (TTAB 1981) (“The absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring.”). *See also King Candy Company*, 496 F.2d at 1402.

### **III. CONCLUSION**

For the reasons set forth above, it is respectfully requested that Bachmann’s motion for summary Judgment be denied and that Scientific Toys’ three cross-motions for partial summary judgment be granted.

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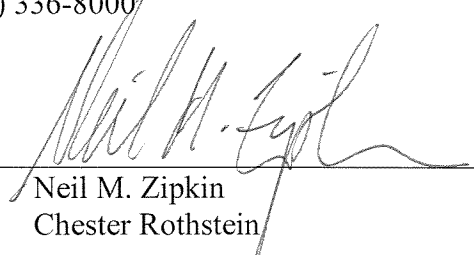
<sup>8</sup> As Mr. Blaine testified during his discovery deposition, the term “EZ” is used as a play on words throughout its catalogs and in advertisements to substitute for the word “easy.” (See Zipkin Decl. Ex. 10, Blaine Dep. 127-133; Zipkin Decl. Ex. 14, Blaine Dep. Exs. 15, 16, 17.)

Respectfully submitted,

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Dated: February 2, 2012  
New York, NY

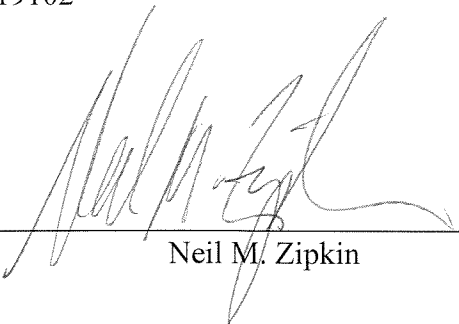
By: \_\_\_\_\_

  
Neil M. Zipkin  
Chester Rothstein

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he is one of the attorneys for Respondent/Counterclaim Petitioner Scientific Toys, Ltd., in the above-captioned cancellation proceeding and that on the date which appears below, he caused a copy of the foregoing RESPONDENT/COUNTERCLAIM PETITIONER SCIENTIFIC TOYS' REPLY IN SUPPORT OF ITS CROSS-MOTIONS FOR SUMMARY JUDGMENT and SUPPLEMENTAL DECLARATION OF NEIL M. ZIPKIN and exhibits thereto to be served on the attorneys for Petitioner/Counterclaim Respondent Bachmann Industries, Inc. by first class mail by causing a copy thereof to be placed in a depository under the care and custody of the United States Postal Service, in the State of new York, postage pre-paid, in a wrapper addressed as follows:

Roberta Jacobs-Meadway, Esq.  
Eckert Seamans  
Two Liberty Place  
50 South 16<sup>th</sup> Street, 22<sup>nd</sup> floor  
Philadelphia, PA 19102

  
\_\_\_\_\_  
Neil M. Zipkin

Dated: New York, New York  
February 2, 2012